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SHORT TERM RESEARCH ASSIGNMENT: A COMPARATIVE ANALYSIS OF AUDIO-VISUAL SERVICES IN SELECTED U.S. AND JAPANESE REGIONAL TRADE AGREEMENTS: LESSONS FOR THE EUROPEAN UNION

Bregt Natens

A Comparative Analysis of Audio-visual Services in Selected U.S. and Japanese Regional Trade Agreements: Lessons for the European Union

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Abstract

In 2013, the European Union (EU) initiated negotiations for regional trade agreements (RTAs) with the United States (U.S.) and Japan, two of the largest economies in the world and key trading partners. Both countries have strong offensive interests in audio-visual services, a sector in which the cultural exception is a symbolic defensive interest to the EU. Firstly, this report sets the scene: what is the audio-visual services sector and how does it relate to the cultural exception? It also addresses some key legal concerns surrounding EU practice in its RTAs. Subsequently, it assesses how the U.S. and Japan have addressed audio-visual services in RTAs with counterparties with similar defensive interests. The four case studies are NAFTA (as concerns Canada), the U.S.-Korea RTA, the Japan-India RTA and the Japan-Switzerland RTA. It concludes with some possible recommendations for the EU.

Key Words

Audiovisual services, audio-visual services, regional trade agreements, RTAs, free trade agreements, FTAs, TTIP, EU-Japan, regulatory autonomy, sovereignty, cultural exception, *exception culturelle*

Author

Bregt Natens is PhD researcher at the Leuven Centre for Global Governance Studies and the Institute for International Law (KU Leuven). Bregt.Natens@ggs.kuleuven.be.

SAMENVATTING

Sinds 2013 onderhandelt de Europese Unie (EU) vrijhandelsakkoorden met de Verenigde Staten (V.S.) (het 'Transatlantic Trade and Investment Partnership' of TTIP) en Japan. Beide landen hebben sterke offensieve belangen in audiovisuele diensten, een traditioneel gevoelige sector in de EU. Het huidige Europese beleid ter zake is tweeledig. In het kader van de Algemene Overeenkomst betreffende handel in diensten (GATS) vallen audiovisuele diensten binnen het toepassingsgebied van het handelsakkoord maar beperkte de EU haar verplichtingen. Dat gebeurde aan de ene kant door middel van vrijstellingen voor de verplichting tot meestbegunstiging (MFN), en aan de andere kant door middel van beperkingen in de Lijst van specifieke verbintenissen (voor de verplichtingen tot markttoegang en nationale behandeling). In de bestaande Europese vrijhandelsakkoorden werd een andere strategie gehanteerd: audiovisuele diensten werden expliciet uitgesloten van het toepassingsgebied van de relevante bepalingen. In beide gevallen wordt gewag gemaakt van een 'culturele exceptie', die in de praktijk focust op audiovisuele diensten.

In de context van de onderhandelingen met de V.S. en Japan rijst de vraag of de EU deze lijn zal aanhouden en, indien niet, hoe het toekomstig beleid er uit kan zien. In dit geval is het huidige beleid van de V.S. en Japan ten aanzien van andere handelspartners met defensieve belangen in audiovisuele diensten mogelijks indicatief. Een analyse van vier vrijhandelsakkoorden (tussen de V.S. en Canada, de V.S. en Korea, Japan en Zwitserland, en Japan en India) toont met name aan welke beperkingen op de liberalisering van audiovisuele diensten eerder aanvaard werden door de V.S. en Japan.

In het eerste, tweede en derde deel van het rapport wordt ingegaan op de problematiek van de huidige culturele exceptie voor audiovisuele diensten. Het doel van deze exceptie is de bescherming van culturele diversiteit en pluralisme, een verplichting die rust op de EU zoals neergelegd in Artikel 3 §3 van het Verdrag betreffende de Europese Unie. De bijdrage van de huidige incarnatie van de culturele exceptie aan dit doel staat echter mogelijks onder druk. Ten eerste betreft de exceptie enkel audiovisuele diensten en niet andere diensten met relevantie voor cultureel pluralisme. Ten tweede geldt dit nog nadrukkelijker voor classificatieproblemen tussen audiovisuele diensten en naburige dienstensectoren. De cruciale vraag is bijgevolg of de culturele exceptie haar doel niet gedeeltelijk voorbijschiet. Bovendien is dergelijke uitsluiting van audiovisuele diensten mogelijks te restrictief om het doel van de culturele exceptie te bereiken. Eventuele offensieve Europese belangen en de voordelen van handelsliberalisering waarop het Europese handelsbeleid gebaseerd is, worden mogelijks beknot zonder dat dit bijdraagt aan het

beschermen van culturele pluraliteit en diversiteit. Technologische evoluties in de sector versterken beide problemen. De rechtsonzekerheid die hieruit volgt is groot.

Het vierde en extensieve deel van het rapport omvat vier casestudies waarin de behandeling van audiovisuele diensten centraal staan. De eerste casestudy is de 'North American Free Trade Agreement' (NAFTA) voor wat betreft de V.S. en Canada. NAFTA, dat dateert van 1994, bevat een exceptie voor een gedefinieerde categorie van culturele industrieën. Deze sub-sectoren zijn uitgesloten van het toepassingsgebied van de relevante bepalingen. Een dergelijke benadering heeft echter dezelfde problemen, zoals hierboven aangehaald, als de huidige Europese aanpak. De tweede casestudy is het vrijhandelsakkoord tussen de V.S. en Korea (KORUS) uit 2012. In dit akkoord worden audiovisuele diensten behandeld als eender welke dienstensector, met dien verstande dat Korea een aanzienlijke hoeveelheid beperkingen op de liberalisering in de sector onderhandelde. De meest relevante van deze beperkingen zijn verschillende types quota en lokale inhoudsvereisten, en de expliciete toelating om bepaalde specifieke activiteiten *ex post* te reguleren zonder daarbij gebonden te zijn door de relevante verplichtingen. Subsidies werden evenzeer uitgesloten van de verplichtingen betreffende handel in diensten en kunnen bijgevolg worden gebruikt als beleidsinstrument.

De derde casestudy, het Japan-Zwitserland vrijhandelsakkoord uit 2009, biedt meer inzicht in relevant beperkingen op de liberalisering van audiovisuele diensten. Hoewel Zwitserland, net als de EU, geen verbintenissen opnam in het kader van GATS, werd de audiovisuele sector in dit vrijhandelsakkoord gedeeltelijk geliberaliseerd. Dit gebeurde echter met een nadruk op het behoud van culturele diversiteit en pluraliteit. De belangrijkste beperking stelt dat audiovisuele diensten die momenteel niet op de Zwitserse markt worden aangeboden uitgesloten worden van bepaalde verplichtingen. Een dergelijke vooruitziende beperking kan de rechtszekerheid sterk vergroten. Daarnaast zijn onder meer ook lokale (zowel Zwitserse als Europese) inhoudsvereisten opgenomen. De laatste casestudy behandelt het vrijhandelsakkoord tussen Japan en India uit 2011. Ook in dit akkoord zijn audiovisuele diensten onderworpen aan verplichtingen. India beperkte deze verplichtingen onder meer door te stellen dat toekomstige beleidsbepalingen omtrent buitenlandse directe investeringen de verbintenissen omtrent audiovisuele diensten kunnen beperken. De beperkingen zijn weliswaar minder toepasbaar voor de EU, en beperkter dan in het geval van Korea en Zwitserland.

Tot slot stelt de paper dat de onderhandelingen omtrent audiovisuele diensten tussen de EU en de V.S., Japan en in het kader van de plurilaterale 'Trade in Services Agreement' (TiSA) vier

pistes kan volgen. Het uitgangspunt is steeds dat een culturele exceptie behouden blijft, al kan de vorm ervan wijzigen. De eerste mogelijkheid is eerder theoretisch en houdt in dat een uitzonderingsgrond (zoals in Artikel XIV GATS of Artikel XX GATT) zou worden toegevoegd voor de bescherming van culturele diversiteit. Deze oplossing is weinig aantrekkelijk gelet op de verscheidene voorwaarden die moeten vervuld worden om van een uitzonderingsgrond gebruik te maken. De rechtspraak omtrent de aangehaalde artikels illustreert dit. De tweede mogelijkheid is een status quo in vergelijking met de Europese praktijk in vrijhandelsakkoorden waarbij audiovisuele diensten worden uitgesloten van het toepassingsgebied van de relevante bepalingen. Dit is zeer onwaarschijnlijk in de TiSA onderhandelingen aangezien dit de andere partijen niet toelaat de sector onderling te liberaliseren. Een dergelijke aanpak werd ook geweigerd in de onderhandelingen voor GATS. De vraag rijst daarnaast of de V.S. en Japan akkoord zullen gaan met een totale uitsluiting.

De derde mogelijkheid repliceert de situatie onder GATS: audiovisuele diensten vallen binnen het toepassingsgebied van het akkoord maar er worden geen verbintenissen aangenomen voor audiovisuele diensten en eventuele uitzonderingen op het meestbegunstigingsprincipe opgenomen. Een laatste mogelijkheid is gebaseerd op het Zwitsers en Koreaans model. Hierbij zijn audiovisuele diensten weliswaar onderworpen aan de verplichtingen in een akkoord maar wordt culturele diversiteit beschermd door middel van beperkingen. Dit kan de voornoemde problemen van de huidige culturele exceptie oplossen, maar vereist zeer zorgvuldig juridisch werk om geen ongewenste liberalisering te creëren. Deze strategie kan worden aangevuld met een uitsluiting van specifieke subsectoren binnen de audiovisuele sector.

De Europese defensieve belangen en de offensieve belangen van zowel de EU als haar onderhandelingspartners nopen tot een grondig debat omtrent de best mogelijke bescherming van de culturele diversiteit en pluralisme aan de ene kant, en de voordelen van handelsliberalisering in een belangrijke economische sector aan de andere kant.

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A COMPARATIVE ANALYSIS OF AUDIO-VISUAL SERVICES IN SELECTED U.S. AND JAPAN REGIONAL TRADE AGREEMENTS: LESSONS FOR THE EUROPEAN UNION*

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* This report is part of the Policy Research Centre's research. It is an ad hoc research assignment conducted by the researcher involved in Pillar 1, International & European Law, Research Track 2, Making the Most of the Liberalisation of Trade in Services: Constraints on Domestic Regulatory Autonomy?

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LIST OF ABBREVIATIONS

- CETA: Comprehensive Economic Trade Agreement between Canada and the European Union
- CPC: United Nations Central Product Classification
- CUSFTA: Canada-United States Free Trade Agreement
- EU: European Union
- GATS: General Agreement on Trade in Services
- KORUS: Korea-United States Free Trade Agreement
- MFN: Most-Favoured-Nation treatment
- NAFTA: North American Free Trade Agreement
- RTA: Regional Trade Agreement
- SSCL: Services Sectoral Classification List
- TFEU : Treaty on the Functioning of the European Union
- TiSA: Trade in Services Agreement
- TTIP: Transatlantic Trade and Investment Partnership
- U.S.: United States
- WTO: World Trade Organization

INTRODUCTION

The European Union's (EU) decision to start negotiations with the United States (U.S.) for the Transatlantic Trade and Investment Partnership (TTIP) and with Japan for the conclusion of a comprehensive, new generation regional trade agreement (RTA) incited *inter alia* a debate on the audio-visual services sector.[1] As the U.S. and Japan have strong offensive interests in audio-visual services,[2] the reticent position of the EU to liberalise this sector is likely to come under pressure in the negotiations. The EU's has taken an adverse position which is fuelled by the so-called cultural exception, which aims to protect cultural diversity and plurality in the EU. Most popularly, the notion of the cultural exception is used in the context of European fears of being flooded by American culture. The aim of the cultural exception has 'constitutional' significance: the EU is required to respect the cultural and linguistic diversity and to safeguard and enhance its cultural heritage by virtue of Article 3 §3 of the Treaty on European Union. However, its specific application to audio-visual services, linked to common misperceptions and technological innovations may require the rethinking of this present conception of the cultural exception in light of the current negotiations.

Moreover, considering the likely pressure on the European position on trade in audio-visual services, the question arises how the U.S. and Japan have sought access to other markets in bilateral talks. Their respective RTAs also shed light on the concessions made by the respective

[1] Although the official negotiating mandates are restricted, an overview is available from European Commission, 'Member States Endorse EU-US Trade and Investment Negotiations' (2013) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=918> accessed 6 January 2014 and European Commission, 'EU-Japan Free Trade Agreement: Commissioner De Gucht Welcomes Member States' Green Light to Start Negotiations' (2013) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=847> accessed 6 January 2014. A leaked draft negotiating mandate for the TTIP is available at Public Content - World Trade Online, 'Member States Seek More Specifics In U.S.-EU Mandate, Press Jurisdiction' (*Inside Washington Publishers*, 2013) <http://insidetrade.com/Inside-Trade-General/Public-Content-World-Trade-Online/member-states-seek-more-specifics-in-us-eu-mandate-press-jurisdiction/menu-id-896.html> accessed 7 January 2014. Additionally, it should be noted that little is known and little is asked concerning the mandate for the plurilateral Trade in Services Agreement, although there are few reasons to expect a different EU approach there. See European Commission, *Negotiations for a Plurilateral Agreement on Trade in Services* (MEMO/13/107, 2013); European Parliament, *Resolution of 4 July 2013 on the Opening of Negotiations on a Plurilateral Agreement on Services* (P7_TA-PROV(2013)0325, 2013) paras. 12 and 16; Pierre Sauvé, *Dr. Jekyll or Mr. Hyde? Reflections on the Trade in Services Agreement (TISA)* (Study for the European Parliament Directorate-General for External Policies of the European Union Workshop on the Plurlilateral Agreement on Services EXPO/B/INTA/FWC/2009-01/Lot 7/35, 2013) 23.

[2] Jan Loisen, *Actorposities inzake Cultuur en Handel in Internationale Fora* (Rapport Steunpunt Buitenlands Beleid, Toerisme en Recreatie, 2010) 31.

counterparties in audio-visual services to the demands for liberalisation.[3] Therefore, this report compares two American RTAs, i.e. with Canada and Korea, and two Japanese RTAs, i.e. with India and Switzerland. All four counterparties have strong defensive interests[4] in audio-visual services and are comparable to the EU for our purposes. The outcome of this comparison is twofold. First, by relating commitments in the RTA to those in the multilateral General Agreement on Trade in Services (GATS), the comparison will shed some light on what demands can be expected. Secondly, and more importantly, the comparison highlights which Canadian, Korean, Indian and Swiss defensive interests have been accommodated in the final agreements.

This report continues as follows. Firstly, we will address the scope of the cultural exception. Secondly, we define the audio-visual services sector and how it relates to the cultural exception. Thirdly, we address some relevant issues in EU trade policy and how an RTA may restrict regulatory autonomy in the audio-visual services sector. Fourthly, we analyse the American and Japanese offensive successes and the counterparties' defensive attainments in their respective RTAs with Canada and Korea, and Switzerland and India. Lastly, we present the main conclusions.

1. THE EUROPEAN UNION AND THE CULTURAL EXCEPTION

To mitigate the risks of trade liberalisation vis-à-vis culture, notably the domination of American culture in a free market, some countries have sought to *"safeguard Member States' cultural prerogatives"* and their *"freedom to define and implement cultural policies"*.[5] The European Commission understands this 'cultural exception' as aiming at protecting cultural diversity,[6] through what are in practice trade-restrictive measures which protect domestic audio-visual

[3] For a more general paper on audio-visual services in RTAs, see Martin Roy, 'Beyond the Main Screen: Audiovisual Services in PTAs' in Juan A Marchetti and Martin Roy (eds), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations* (Cambridge University Press 2008).

[4] Defensive interests are interests for which (more) liberalization is not wanted, for example because the relevant domestic producers are likely to be less competitive than foreign producers. Offensive interests are interests for which there is an incentive to liberalise, for example because the domestic producers are likely to gain market share abroad.

[5] Evangelia Psychogiopoulou, 'The External Dimension of EU Cultural Action and Free Trade: Exploring an Interface' (2014) 41 Legal Issues of Economic Integration 65, 66.

[6] European Commission, *European Commissioner for Trade Karel De Gucht on the Transatlantic Trade and Investment Agreement: The Cultural Exception is Not Up for Negotiation!* (MEMO/13/363, 2013).

services and their providers from foreign competition in a free market.[7] In the context of the regulation of international trade, the cultural exception is the main instrument to achieve these goals.[8] The strategies to do so include (i) an exclusion of culture from an agreement, (ii) the special treatment of culture within an agreement, or (iii) an exception clause for the protection of culture. We use the term 'cultural exception' regardless of the strategy used.

The rationale behind a cultural exception relates foremost to the protection of national and cultural identity and heritage—a vital interest for a society,[9] also in comparison to the classic exception grounds in trade law such as national security, public health, public morals or national treasures of artistic value—and the protection of international cultural diversity and pluralism.[10] The value of cultural diversity is not merely economic but culture also has an economic value. Based on this understanding, an additional economic rationale can be put forth: cultural goods and services are different from other goods and services, because they are not governed by traditional economic principles of comparative advantage. For example, (i) a monetary valuation does not take into account the intrinsic value; (ii) these goods and services are not substitutable nor interchangeable; (iii) a third country will not specialise in making another country's cultural products or supplying its services.[11]

Although the underlying issue is much older and can for example be traced back to the 1920s, the very early days of cinema,[12] the origins of the cultural exception in international trade lie in the Uruguay Round of negotiations.[13] The conclusion of these negotiations led to the

[7] For an overview of different 'formats' in which such a goal can be reached, see Sandrine Cahn and Daniel Schimmel, 'The Cultural Exception: Does it Exist in GATT and GATS Frameworks? How Does it Affect or is it Affected by the Agreement on TRIPS' (1997) 15 Cardozo Arts & Entertainment Law Journal 281, 293-297.

[8] It should be noted that the General Agreement on Trade in Services does not contain a cultural exception, but rather no specific commitments (regarding market access and national treatment obligations) on audio-visual services were made by the EU. Moreover, the EU scheduled several exemptions to the Most-Favoured-Nation obligation for audio-visual services. Also see Emmanuel Cocq and Patrick A Messerlin, *The French Audiovisual Policy: Impact and Compatibility with Trade Negotiations* (Hamburg Institute of International Economics HWWA Report 233, 2003) 5-6.

[9] Again, see Article 3 §3 of the Treaty on European Union.

[10] Cahn and Schimmel 281 281-283; Joongi Kim, 'The Viability of Screen Quotas in Korea: The Cultural Exception under the International Trade Regime' (1998) 26 Korean Journal of International and Comparative Law 199, 225-226.

[11] Kim 226.

[12] See Victoria de Grazia, 'Mass Culture and Sovereignty: The American Challenge to European Cinemas, 1920-1960' (1989) 61 The Journal of Modern History 53.

[13] See Caroline Pauwels and Jan Loisen, 'The WTO and the Audiovisual Sector: Economic Free Trade vs Cultural Horse Trading?' (2003) 18 European Journal of Communication 291, 292-296; Frederick Scott Galt, 'The Life, Death and Rebirth of the "Cultural Exception" in the Multilateral Trading System: An

establishment of the World Trade Organization (WTO) in 1995. Coincidently, GATS was adopted. Aside from Canada,[14] especially France spoke out in favour of a cultural exception.[15] In today's trade negotiations, upholding the cultural exception remains a strong defensive interest of the EU.

2. THE AUDIO-VISUAL SERVICES SECTOR AND THE CULTURAL EXCEPTION

In trade parlance, the audio-visual services sector has *"historically been plagued by problems of illdefinition, misperception, and intransigence."*[16] This is partly due to the fact that the scope of the sector is often misunderstood. There are three components which add to the complexity of defining the scope of the audio-visual services sector.

First, when addressing services sectors in international trade law, one must properly (attempt to) classify the relevant services. The main instrument for the sectoral classification of services is the WTO's Services Sectoral Classification List (SSCL), which in turn is based on the United Nations Central Product Classification (CPC 1.0). The SSCL is not obligatory, but in practice many WTO Members have followed its classification in their schedules of specific commitments. It should be noted that the SSCL categories are supposed to be mutually exclusive.[17] According to the SSCL, the audio-visual services sector is a part of the broader category of 'communication services'. The audio-visual services sector contains five subcategories and a residual category. The subcategories are: (a) motion picture and video tape production and distribution services, (b) motion picture projection services, (c) radio and television services, (d) radio and television transmission services, and (e) sound recording. The residual category (f) is called 'other'.[18] Aside from audio-visual services, the list contains a category of 'recreational,

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Evolutionary Analysis of Cultural Protection and Intervention in the Face of American Pop Culture's Hegemony' (2004) 3 Washington University Global Studies Law Review 909, 911-915; Martin Roy, 'Audiovisual Services in the Doha Round: *"Dialogue de Sourds, the Sequel?"* (2005) 6 The Journal of World Investment & Trade 923, 925-930; Jan Loisen, *Overzicht van de Internationale Beleidscontext voor het Vlaamse Cultuur- en Mediabeleid (met Focus op Audiovisueel Beleid)* (Rapport Steunpunt Buitenlands Beleid, Toerisme en Recreatie, 2009) 115-127.

[14] Mary E Footer and Christoph Beat Graber, 'Trade Liberalization and Cultural Policy' (2000) 3 journal of International Economic Law 115, 119-123.

[15] Sophie Meunier, 'The French Exception' (2000) 79 Foreign Affairs 104, 106-107.

[16] Galt 909 and the references at note 4 there.

[17] *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/AB/R, AB report adopted 20 April 2005 para. 180.

[18] World Trade Organization, *MTN.GNS/W/120, Services Sectoral Classification List* (1991). See S/C/W/310, Audiovisual Services (Background Note by the Secretariat 12 January 2010) 2, table 1.

cultural and sporting services' (the heading explicitly states 'other than audio-visual services'), which includes (a) entertainment services (including theatre, live bands and circus services), (b) news agency services, (c) libraries, archives, museums and other cultural services, (d) sporting and other recreational services, and (e) other services.[19] The sector 'other business services' includes subsector (r) publishing and printing services. Thus, these subsectors are not part of the audio-visual services sector in the GATS context. Additionally, the distribution services sector is likely to be very relevant to audio-visual services,[20] as may be the telecommunications services sector,[21] the computer and related services sector,[22] or the rental/leasing services without operators sector.[23] Considering this amalgam of possibly relevant sectors, classification issues are likely to arise.[24] These concerns are seriously increased by technical innovations,[25] which seem unlikely to halt.

As a result of the exclusive nature of classification, the audio-visual services sector does not cover these other cultural and supporting or adjoining services. Consequently, the term 'cultural exception' should be used carefully, as it indicates a broader coverage than just audio-visual services—a difference which is not always clear in media reports.[26] The European Commission,

[19] World Trade Organization SSCL.

[20] Footer and Graber 137-138; S/C/W/310, Audiovisual Services (Background Note by the Secretariat 12 January 2010) para. 7. With the exception of 'Motion picture and video tape production and distribution services', which are, as noted, part of the audio-visual services sector.

[21] Cahn and Schimmel 303. Also see Americo Beviglia Zampetti, *WTO Rules in the Audio-Visual Sector* (Hamburg Institute of International Economics HWWA Report 229, 2003) 4; S/C/W/310, Audiovisual Services (Background Note by the Secretariat 12 January 2010) paras. 9 and 84. At para. 9, the WTO Secretariat notes that

> *"a specific commitment under GATS on telecommunication services (2.C.) would generally cover the transmission of signals, but would not entail a commitment on the supply of audiovisual content* […]*."*

[22] Pauwels and Loisen 306.

[23] S/C/W/310, Audiovisual Services (Background Note by the Secretariat 12 January 2010) para. 7.

[24] See Rolf H Weber and Mira Burri-Nenova, *Classification of Services in the Digital Economy* (Springer 2013).

[25] Pauwels and Loisen 300. Also see Sacha Wunsch-Vincent, *WTO, E-commerce, and Information Technologies: From the Uruguay Round through the Doha Development Agenda* (Report for the UN ICT Task Force, 2005); Rolf H Weber, 'International E-Trade' (2007) 41 The International Lawyer 845; Rolf H Weber, 'Digital Trade in WTO-Law - Taking Stock and Looking Ahead' (2010) 5 Asian Journal of WTO & International Health Law and Policy 1. As concerns convergence between previously distinct subsectors and regulatory frameworks, see S/WPDR/W/48, Regulatory Issues in Sectors and Modes of Supply (Note by the Secretariat 13 June 2012) paras. 92 and 109-114.

[26] See, e.g., Der Spiegel International, 'Culture Wars: French 'Exception' Threatens Trade Deal' (*Der Spiegel*, 2013) <http://www.spiegel.de/international/europe/culture-wars-france-could-derail-trade-deal-with-exceptions-a-905535.html> accessed 6 January 2014; James Kanter, 'European Parliament Moves to Limit Scope of Eventual U.S. Trade Deal' (*The New York Times - The International Herald Tribune*, 2013) <http://www.nytimes.com/2013/05/24/business/global/24iht-trade24.html?_r=0> accessed 6

does make a clear distinction and has highlighted that the audio-visual sector *"has a clear place"* among sensitive sectors covered by the cultural exception.[27] Nonetheless, for ease of terminology—and considering that in the context of this debate 'culture' and 'audio-visual' have become largely synonymous—[28] this report only addresses the cultural exception as it applies to the audio-visual sector. The term cultural exception is henceforth used in this narrow way.

Second, and to add to the complexity of the debate, not all audio-visual services are necessarily covered by the cultural exception in the view of EU officials and negotiators. This was noted by President of the European Commission Barroso and Trade Commissioner De Gucht.[29] As stated by the WTO Secretariat, the *"importance of the* [audio-visual services] *sector stems from the fact that it has both economic components as well as social and cultural ones."*[30] For supporters of a carve-out for audio-visual services from trade negotiations, such an approach opens up Pandora's box. For the European Commission, it appears to be a matter of creating *"new opportunities for Europe's creative industries of the future"*, in order to *"secure a strong future in a high-tech sector that is developing at an extraordinary pace from social media to on-line distribution."*[31] The European Commission did not explicitly identify any of these offensive interests nor did it address specifically how partial liberalisation will create such opportunities considering the existing commitments of the U.S. and Japan. Although general trade theory may presume such an effect, a detailed economic analysis *in casu* would be highly relevant.

In any case, it is likely to be erroneous to see 'the EU audio-visual services sector' as a homogenous sector considering the multitude interests within each Member State, as

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January 2014 and Martin Banks, 'France on Collision Course with EU Commission over US Trade Deal' (*TheParliament.com*, 2013) <http://www.theparliament.com/latest-news/article/newsarticle/france-on-collision-course-with-eu-commission-over-us-trade-deal/#.UsrUKvRDvq8> accessed 6 January 2014.

[27] European Commission, *European Commissioner for Trade Karel De Gucht on the Transatlantic Trade and Investment Agreement: The Cultural Exception is Not Up for Negotiation!*. Similarly, see European Parliament, *Resolution of 23 May 2013 on EU Trade and Investment Negotiations with the United States of America* (P7_TA-PROV(2013)0227, 2013) paras. 10-11. Also see European Parliament, *Resolution of 4 July 2013 on the Opening of Negotiations on a Plurilateral Agreement on Services* paras. 12 and 16; European Parliament, *Resolution of 12 March 2003 on the General Agreement on Trade in Services (GATS) within the WTO, including Cultural Diversity* (P5_TA(2003)0087, 2003) paras. 12-13.

[28] Footer and Graber 119.

[29] European Commission, *Le Président Barroso Rassure les Cinéastes Européens sur la Protection de la Culture dans les Négociations avec les Etats-Unis* (MEMO/13/537, 2013); European Commission, *European Commissioner for Trade Karel De Gucht on the Transatlantic Trade and Investment Agreement: The Cultural Exception is Not Up for Negotiation!*.

[30] S/C/W/310, Audiovisual Services (Background Note by the Secretariat 12 January 2010) para. 2.

[31] European Commission, *European Commissioner for Trade Karel De Gucht on the Transatlantic Trade and Investment Agreement: The Cultural Exception is Not Up for Negotiation!*.

exemplified by publicly opposing statements by Member States' representatives.[32] Moreover, the music sector (which is already largely vertically integrated) and gaming sector (an inherently international sector) appear less outspoken about the exclusion of the sector. The main concern may thus lie with film services,[33] and possibly the television sector. The film sector indicates that it has no offensive interests, as the American market is difficult to penetrate and the interest may be insufficient. Even if these offensive interests would prove insufficient compared to the defensive interests in the same subsectors, a conception of the cultural exception that is broader than necessary to protect cultural diversity and pluralism may have an unwarranted political cost in the negotiations. The protection of specific services sectors that do not contribute to the goal of the cultural exception has an opportunity cost in the form of negotiation capital, for which more suitable alternative uses are likely to arise in all aforementioned negotiations.

Moreover, today's audio-visual services sector is characterised by a few vertically integrated key players and an—at least economic—predominance of U.S. firms, resulting from *inter alia* advantages of scale, wealth and language.[34] It has been noted that the 'natural outcome' for industries with these characteristics is not diversity but oligopolisation, unless policy interventions support smaller players in smaller minority-language markets with smaller budgets.[35] It is perhaps an offensive interest of the EU to tackle this oligopolisation, as it forms an impediment to trade that may be much larger than many protectionist measures,[36] and equally threatens diversity as it induces homogenisation.[37]

[32] This is not a new situation, as the history of audio-visual talks in the Uruguay Round makes clear. See Loisen, *Overzicht van de Internationale Beleidscontext voor het Vlaamse Cultuur- en Mediabeleid (met Focus op Audiovisueel Beleid)* 113-127. Also see European Audiovisual Observatory, 'Country Guide' (2014) <http://www.obs.coe.int/country> accessed 19 March 2014 for some country-specific information.

[33] Cine-Regio, *Cine-Regio Common Declaration EU-US TTIP Mandate* (ID 46323662272-17, 4 April 2013, 2013); EPC EUROCINEMA, EBU, FERA, FIAD, UNIC and SAA,, *Transatlantic Trade and Investment Partnership (TTIP)* (Open Letter 10 April 2013, 2013).

[34] Gillian Doyle, *Audio-visual Services: International Trade and Cultural Policy* (Asian Development Bank Institute Working Paper N° 355, 2012) 4 and 8-9.

[35] Ibid 9.

[36] Christoph Beat Graber, 'WTO: A Threat to European Films?' (V Congreso "Cultura Europea", Pamplona, 28-31 October 1998) 876-877; S/CSS/W/74, Communication from Switzerland: GATS 2000: Audio-visual Services (4 May 2001) para. 15; Doyle 17. On the regulation of competition in audio-visual services, also see S/WPDR/W/48, Regulatory Issues in Sectors and Modes of Supply (Note by the Secretariat 13 June 2012) paras. 115-118.

[37] Christoph Beat Graber, 'Audiovisual Media and the Law of the WTO' in Christoph Beat Graber, Michael Girsberger and Mira Burri-Nenova (eds), *Free Trade Versus Cultural Diversity* (Schulthess 2004) 61-62.

Third, the abovementioned remarks by top officials of the European Commission point at a crucial challenge for audio-visual services policy and the cultural exception: the technological evolutions in providing audio-visual services through the internet. As the WTO Secretariat notes:

> *"The sector has undergone - and will continue to experience - significant change as a result of technological advances. Among other things, these make it easier, in terms of cost, quality and time, to transmit greater amount of content within and across borders; allow content to be distributed on a variety of platforms and devices by diverse operators; and give greater control to consumers over what they want to watch or listen, when, where, and how."*[38]

Audio-visual services have become an important part of the digital economy, and are hoped to contribute substantially to economic revival and growth.[39] The compromise between EU Member States, namely France, and the European Commission on the final TTIP negotiating mandate highlights this challenge. Audio-visual services are currently not part of the mandate but the European Commission may go back to the Council to request further negotiating directives,[40] which could include audio-visual services. Moreover, according to Trade Commissioner De Gucht, *"what is really at stake in this sector is the digital revolution of the media environment. But there is currently no EU legislation on digital media."*

It has been argued that the existing and conventional policy frameworks insufficiently address these changes (for example in supply and demand) brought by the digital revolution and lack the *"potency to address appropriately the new digital conditions"*.[41] Take foreign content restrictions, which may no longer prove viable in a 'pull' model where consumers decide what they want to see and hear and when they do it.[42] Similarly, it is unclear how these evolutions will reflect on existing obligations and commitments in GATS and RTAs, and more precisely whether the current

[38] S/WPDR/W/48, Regulatory Issues in Sectors and Modes of Supply (Note by the Secretariat 13 June 2012) para. 108.

[39] Doyle 12. In 2008, the worldwide market for audio-visual services was projected at 516 billion U.S.$, over two and a half times that of for example newspaper publishing or internet access. S/C/W/310, Audiovisual Services (Background Note by the Secretariat 12 January 2010) para. 17.

[40] See European Commission, 'Member States Endorse EU-US Trade and Investment Negotiations'.

[41] Mira Burri-Nenova, 'Trade Versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition' (2008) 12 Journal of International Economic Law 17, 40-45; Doyle 13.

[42] S/C/W/310, Audiovisual Services (Background Note by the Secretariat 12 January 2010) paras. 80-83. The old model is a 'push' model, whereby media is pushed to all consumers through a limited number of, for example, television channels. Non-linear services, such as pay on demand, may prove especially difficult to regulate effectively through existing policy frameworks, as do new methods of media consumption.

approach to a cultural exception is still fitted for its purpose.[43] It is unsurprising that the potential of such technological evolutions and their impact on trade obligations and commitments spur the interest of the EU's counterparties with offensive interests in the sector, who are likely to focus their leverage on these issues rather than on existing trade-restrictive measures.[44]

In conclusion, the above highlights three key issues. First, the cultural exception as applied to audio-visual services does not cover all cultural services relevant for cultural diversity and pluralism. In this sense, it may prove increasingly ill-fitting to achieve its goal. The legal uncertainty in this regard is substantial. This may equally be contrary to the approach of technological neutrality as applied in the Audiovisual Media Services Directive.[45] Second, the cultural exception as applied to audio-visual services may restrict an offensive potential of the EU audio-visual services sector. This could limit the potential of an increasingly important economic services sector. If not limiting the offensive potential, and as noted, an overly broad notion of cultural exception could have an opportunity cost in the form of lost negotiation capital if this cost is not necessary to protect cultural diversity and cultural pluralism. Third, technological evolutions in this rapidly changing sector have a crucial influence on both the first and second issue. Technological evolutions impact on the contribution of the cultural exception to its legitimate goal. On the other hand, such evolutions may mean that the cultural exception as applied to audio-visual services is overly restrictive of trade. Of course, non-economic policy goals play an important role in the determination of the appropriate trade policy. Nevertheless, from the

[43] See Mira Burri-Nenova, 'Reconciling Trade and Culture: A Global Law Perspective' (2011) 41 The Journal of Arts Management, Law and Society 1, where the author argues in favour of a trade *and* culture approach by successfully depolarising the debate, both on trade *versus* culture and on the technological changes in the media landscape.

[44] Inside U.S. Trade, 'Mandate Text Makes Future Negotiations On Audiovisual Services Unlikely' (*Inside Washington Publishers*, 2013) <http://insidetrade.com/Inside-Trade-General/Public-Content-World-Trade-Online/mandate-text-makes-future-negotiations-on-audiovisual-services-unlikely/menu-id-896.html> accessed 9 January 2014, noting that:

> *"In the U.S., industry sources have said they are most interested in ensuring that current EU policies aimed at protecting the audiovisual industry through subsidies and quotas in film screenings, television and radio programming is not extended to new technologies."*

This is not a new insight, as it was already put forth over ten years ago: see Pauwels and Loisen 301, referring to a 2000 U.S. proposal to liberalise audio-visual services, where it is argued that the 'new' audio-visual services sector differ significantly from the 'old' one.

[45] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions laid down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services. The Directive applies to moving images with or without sound, thus including silent films but not covering audio transmission or radio services (recital 23). It applies regardless of whether the content is linear or non-linear; broadcasted or as content provided through electronic communications networks.

perspective of the cultural exception, such an overly restrictive approach to trade may be debatable. Hence, the overlap between the scope of the cultural exception and the audio-visual services sector is, at both ends, existent but only partial. Additionally, even if the first or the second proposition were to fail further scrutiny, the prevalence of either proposition by itself is still suffice,t to warrant thorough scrutiny of the existing conception of the cultural exception. Hence, it is argued that it may be in the best interest of both the protection of cultural pluralism and diversity, and of services liberalisation to strike a deal that balances culture and economic interests in an encompassing and more legally certain way.[46] This understanding can serve as a guide to the interpretation of the comparative analysis of RTAs that follows.

3. THE EUROPEAN UNION, ITS RTAS AND AUDIO-VISUAL SERVICES

A. EU policy on audio-visual services in its existing RTAs

EU policy on audio-visual services in existing RTAs is twofold. First, in a more general context, several existing EU RTAs include Protocols on Cultural Cooperation,[47] although it is unclear whether the European Commission is looking to conclude similar agreements in the future.

[46] See Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge University Press 2007) 33-34, who summarises the framework for such a balancing exercise as follows:

> *"Although the cultural industry is a business like any other, cultural products do have cultural, non-commercial features that distinguish them from other tradable goods and services. And sales of local cultural products in the marketplace may not adequately reflect the cultural value of those products to the wider community. This 'market failure' explains why some Members may wish to intervene in support of these products. Moreover, if Members see local cultural products as a means of communication among their people, or if they do not wish to stifle creativity, free speech, or the progressive development of culture, they may need to support local cultural products in a manner that discriminates expressly against foreign cultural products."*

[47] L 289/I/3, 30 October 2008, Economic Partnership Agreement between the CARIFORUM States and the European Community; L 127/6, 14 May 2011, Free trade Agreement between the European Union and the Republic of Korea; L 346/3, 15 December 2012, Association Agreement between the European Union and Central America. Also see the standalone Agreement on Cultural Cooperation between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, which is similar to the Protocols. The aforementioned EU-Central America Protocol and the EU-Colombia and Peru Agreement have not yet entered into force. For an overview of their content, see Jan Loisen, *Culturele Samenwerkingsprotocollen van de Europese Unie met Derde Landen: Stand van Zaken en Uitdagingen voor Vlaanderen* (Rapport Steunpunt Buitenlands Beleid, Toerisme en Recreatie, 2010) and Psychogiopoulou 73-84. On the EU-Korea Protocol, also see Jan Loisen and Ferdi De Villé, 'The EU-Korea Protocol on Cultural Cooperation: Toward Cultural Diversity or Cultural Deficit?' (2011) 5 International Journal of Communication 254, who conclude that notwithstanding some strands of criticism on the Protocol are justified, the European Commission did not use the Protocol as a 'back door' way of putting audio-visual services on the trade negotiating table.

Additionally, the EU's foreign cultural policy is not limited to RTAs: according to the European Commission, and this view was endorsed by the Council and the European Council,[48] the EU should systematically integrate *"the cultural dimension and different components of culture in all external and development policies, projects and programmes"* and support specific cultural actions and events as *"access to culture should be considered as a priority in development policies"*.[49] Second, as concerns legally binding provisions on trade in services, the EU has taken care to explicitly exclude audio-visual services from the scope of the relevant, binding sections regulating trade in services. Hence, in contrast to what is the case in GATS, audio-visual services are by default not covered by these disciplines on services.

B. A 'multilateralising' effect from existing Most-Favoured-Nation clauses?

In the context of increased pressure on the EU to liberalise the audio-visual services sector, it may nonetheless be questioned whether potential commitments for audio-visual services have had a backlash. Do such commitments, accorded by the EU to a future RTA partner, need to be extended to existing RTA partners? This could theoretically be the result of a Most-Favoured-Nation obligation (MFN)[50] in an existing RTA, for example between the EU and Country A. The MFN obligation could oblige the EU to extend to Country A more preferential treatment given to subsequent RTA partner Country B. As an MFN provision can be, but is not necessarily formulated in such a 'multilateralising' way, an analysis of MFN obligations should be made on a case by case basis. Concerning the five most recent EU RTAs for which the final text is available,[51] only the EU-CARIFORUM and EU-Korea RTAs contain MFN provisions for services.[52] Both MFN provisions for services in the EU-CARIFORUM RTA are limited to those services within the scope of the relevant section. Audio-visual services have however explicitly been exempted from that scope. Moreover, the MFN provision includes a relevant exception for the protection for commitments related to audio-visual services in future RTAs: the MFN provision does not apply to treatment arising from future regional integration agreements if

[48] Council of the European Union, *Resolution of the Council of 16 November 2007 on a European Agenda for Culture* (OJ C 287, 29 November 2007, 1–4, 2007); European Council, *Presidency Conclusions 16616/1/07 REV 1, 14 February 2008* (2008).

[49] European Commission, *COM(2007) 242 final, Communication on a European Agenda for Culture in a Globalizing World* (2007) 10. For a recent overview of EU foreign cultural policy, see Psychogiopoulou.

[50] In this context, the MFN obligation entails that a party to an RTA may not grant more favourable treatment to any third party than it does to like services or service suppliers from the other party to the RTA.

[51] With the exception of the stabilisation agreements with Serbia, Albania and Montenegro.

[52] This is not the case for the EU-Colombia and Peru, EU-Central America and EU-Iraq RTAs.

these create an internal market or require the parties thereto to significantly approximate their legislation with a view to removing non-discriminatory obstacles to commercial presence and to trade in services.[53]

In the case of the EU-Korea RTA, both MFN provisions on services are equally limited to the scope of the section, of which audio-visual services are explicitly exempted. Additionally, an exception to the MFN provisions exists for treatment arising from future regional economic integration agreements granted if this treatment is granted under sectoral or horizontal commitments for which the other agreement stipulates a significantly higher level of obligations than those undertaken in the relevant section of the EU-Korea RTA.[54] The evaluation of the level of the obligations shall be conducted on the basis of sectoral or horizontal commitments.[55] Considering that the EU did not undertake any commitments in the audio-visual services sectors in the EU-Korea RTA, it seems that any considerable commitments in a future agreement could satisfy the conditions for this exception to the MFN provision, if they encompass the right to establishment and the approximation of legislation.[56] In conclusion, it seems that there are very few risks of 'multilateralising' future commitments in the audio-visual services sector on the basis of these existing MFN provisions in RTAs.

C. Aspects of possible impact on regulatory autonomy of audio-visual services commitments in future EU RTAs

Having established what the existing EU policy on audio-visual services is and that there is no risk of multilateralising future commitments vis-à-vis existing RTA partners, the question remains how EU policy in audio-visual services could be constrained by commitments. This question is impossible to answer *in abstracto*, but three further general issues deserve more attention. First are aspects of possible impact on regulatory autonomy which result from classification issues. Second are those aspects which result from the application of certain obligations to audio-visual services. Third are aspects related to the EU treaties.

[53] EU-CARIFORUM EPA Articles 70 and 79.

[54] EU-Korea RTA Articles 7.8 and 7.14. See Annex 7-B for more details on these thresholds, where it is noted that to be of a significantly higher level, obligations stipulated in a regional economic integration agreement shall either create an internal market on services and establishment or encompass both the right of establishment and the approximation of legislation.

[55] Ibid Annex 7-B para. 1; Chien-Huei Wu, 'Foreign Direct Investment as Common Commercial Policy: EU External Economic Competence After Lisbon' in Paul James Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (Springer/TMC Asscher Press 2012) 397.

[56] EU-Korea RTA Annex 7-B.

C.1 As a result of classification issues

As noted in section 2, the classification of services is most likely to complicate the treatment of audio-visual services, especially considering technological innovations. In the context of audio-visual services, a more fundamental distinction arises first. Are the relevant economic activities services, or are they goods? The analysis should be made in each specific factual matrix.[57] In case it is decided that there is a supply of services, it is key to discern which services are (not) audio-visual services. The complexities of classifying new services using largely outdated classification tools and assessing possibilities of cross-sectoral classification for new methods of service distribution further complicate this analysis.

The legal intricacies of these debates go beyond the scope of this report. A recommendation can nevertheless be made. Although it may be politically difficult, it would be wise to explicitly address these issues in future EU RTAs in order to considerably reduce the legal uncertainty surrounding the scope of commitments and obligations.[58] It is clear from the scholarship that there are simply too many unknown variables in the existing classification system.[59] Only after clarifying of what is covered under which sector an analysis of the contribution of the cultural exception to the protection of cultural diversity and pluralism can be executed.

One example may be helpful. Specific commitments in sectors related to audio-visual services (as identified above) may constrain audio-visual policy if a lack of clarity obscures the delineation between the sectors. For example, streaming pay on demand services may on the one hand be considered to be classified as audio-visual services, more specifically as (c) radio and television services or (f) other, or on the other hand as computer and related services.[60] The U.S., for example, have argued in favour of the latter classification for online games and may equally do so for video on demand. Thus, commitments in other sectors could constrain audio-visual policies in case the classification remains unsettled. The classification issue is complicated further because a method of supply, such as video on demand, can be based on different technologies, business models and proprietorship.[61] A relatively clear-cut classification option is telecommunications,

[57] See, for example, Tania Voon, 'A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS' (2007) 14 UCLA Entertainment Law Review 1, 6-10 and 17-18.
[58] As for example Korea has done in the U.S.-Korea RTA, see *infra*.
[59] See Roy, 'Audiovisual Services in the Doha Round: *"Dialogue de Sourds, the Sequel?"*' 947-949 for an overview and the recent book by Weber and Burri-Nenova, *Classification of Services in the Digital Economy* for an extensive discussion.
[60] Weber and Burri-Nenova, *Classification of Services in the Digital Economy* 123, with references there to scholars who have argued in favour of this classification for video on demand services.
[61] Ibid 121-122.

broadcasting and information supply services, which is a new category in the updated CPC 2.0.[62] (Although the link between the CPC 2.0 and the SSCL is unclear, this would not prevent parties from using it in their bilateral negotiations.) From a legal certainty perspective, the most suitable way to address these concerns is by introducing as much clarity as possible into the schedules, preferably with clear indications on how to classify technological evolutions in the sector.

In any case, considering that this report focuses on audio-visual services, we address only those situations in which it is decided that the economic activity under scrutiny is a supply of a service, and the service can be classified as an audio-visual service.

C.2 As a result of imposing obligations on audio-visual services policy

The exceptional treatment of audio-visual services in RTAs may take three shapes (see section 1). In the case of the EU, two models appear in practice. First, as is the case in EU RTAs, audio-visual services may be explicitly and altogether excluded from the scope of the chapters on services.[63] Second, as is the case in GATS, audio-visual services may not be excluded from the scope of the agreement, but the application of the relevant obligations is limited or excluded. This is the case for the MFN obligation which does not fully apply to the sector because of the MFN exemptions listed by the EU.[64] Similarly, the national treatment and market access obligations do not apply to audio-visual services as the EU did not schedule any specific commitments in that respect.[65] It should be recalled that in GATS and under the existing EU RTAs, the EU has made use of the so-called 'positive listing' approach.[66] Positive listing entails that most notably the

[62] Ibid 124-125.

[63] See, for example, EU-Korea RTA, Articles 7.4 (1) (a) and 7.10 (c).

[64] See GATS/EL/31, European Communities and Their Member States: Final List of Article II (MFN) Exemptions (15 April 1994).

[65] See GATS/SC/31, European Communities and their Member States: Schedule of Specific Commitments (15 April 1994).

[66] See Juan A Marchetti and Martin Roy, *The TISA Initiative: An Overview of Market Access Issues* (World Trade Organization Economic Research and Statistics Division Staff Working Paper ERSD-2013-11, 2013) footnote 6:

> *"Generally speaking, in a positive-list approach to scheduling commitments, market access and national treatment are granted only in the sectors expressly listed by each party in its schedule; for each sub-sector, the parties then indicate the level of commitment granted for each mode of supply. In contrast, in a negative list approach, market access and national treatment apply fully to all covered service sectors, except to the extent that non-conforming measures (commonly referred to as "reservations") providing otherwise have been listed in annexes. In other words, under this approach, everything is in principle liberalized unless specified otherwise in the annexes. In a positive-list approach, nothing is liberalized, unless*

market access and national treatment obligations only apply to those sectors specifically listed. Of course, any scheduled limitations limit such applicability. As will be noted in the case studies, the U.S. makes use of the negative listing approach. A negative list means that all sectors which are not explicitly scheduled, and thereby excluded, are considered to be covered by the relevant obligations. Such an approach would appear to have a lock-in effect and requires very careful scheduling.[67] Japan has used both approaches. Current EU practice may nonetheless change soon. In the context of the plurilateral Trade in Services Agreement (TiSA), a hybrid scheduling approach in which national treatment obligations and limitation would be scheduled according to a negative list and market access through a positive list was agreed.[68] Moreover, although officially unconfirmed, many sources claim that the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) already includes a negative list.[69] It thus seems very likely that the EU will agree on a negative list in the context of TTIP, and possibly also vis-à-vis Japan.

If audio-visual services were to become subject to obligations and commitments in RTAs, the regulatory autonomy for policies in audio-visual services may be limited. These obligations and commitments could preclude the effective use of relevant policy instruments. In the audio-visual services sector, often used policy instruments include content quotas (such as television and cinema screen quotas), import quotas (for example limiting the number of foreign films to be shown in cinemas), foreign equity ceilings, competition rules protecting free access to information and pluralism of media (for example restrictions on cross-ownership or must-carry rules vis-à-vis the domestic audio-visual industry), subsidies (such as national subsidy

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expressly specified otherwise. Negative-list agreements also typically include a 'ratchet' mechanism, which automatically binds future liberalization for remaining existing non-conforming measures."

In case of such ratcheting, a renegotiation of unwanted specific commitments may be possible.

[67] See, on the presumed economic inefficiency of positive listing in comparison to the lock-in effect of negative listing, Rudolf Adlung and Hamid Mamdouh, *How to Design Trade Agreements in Services: Top Down or Bottom Up?* (World Trade Organization Economic Research and Statistics Division Staff Working Paper ERSD-2013-08, 2013).

[68] Marchetti and Roy 4.

[69] For example, see Standing Committee on International Trade of the Parliament of Canada, *Negotiations toward a Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union* (Report, March 2012, 41st Parliament, 1st Session, 2012), where it is noted that *"The Committee has learned, however, that the EU has agreed to take a negative list approach in the negotiations toward a CETA between Canada and the EU"* and The Greens - European Free Alliance in the European Parliament, 'Press Release: EU-Canada Trade Agreement' (2013) <http://www.greens-efa.eu/eu-canada-trade-agreement-10759.html> accessed 19 March 2014, where Yannick Jadot, Member of the European Parliament, states that CETA *"also includes a 'negative list' of service liberalisation for the first time"*.

programmes, the Council of Europe's Eurimages or the EU's MEDIA programme), licensing requirements (for example based on reciprocal market access), fiscal measures (such as taxes on cinema tickets to support the domestic film industry or the Belgian tax shelter), or measures related to intellectual property rights (for example, copyright-based cultural funds which may withhold a certain percentage of copyright revenue to support domestic productions).[70] Thus, several disciplines—for example, relating to market access, competition, subsidies, domestic regulation, non-discrimination and intellectual property rights—may constrain policymakers in their audio-visual services policy options.

Take, for example, the Belgian tax shelter in favour of audio-visual productions. The regime is a fiscal incentive for Belgian commercial establishments investing in Belgian commercial establishments whose main activity is producing audio-visual works, for the production of a film or television series. Under certain conditions, investments related to the production and exploitation costs of the audio-visual work are 150% tax deductible if these costs are made in Belgium. Under GATS law, such an incentive would be qualified as a measure affecting trade in services and is not subject to an exception to the scope of GATS. If the EU were to undertake specific commitments in audio-visual services, the tax shelter would need to be scheduled as a limitation to the national treatment obligation as it awards more favourable treatment to domestic service suppliers than it does to foreign suppliers. Alternatively, the tax shelter could be exempted from the scope of the obligation by scheduling a horizontal limitation for subsidies.[71]

Of course, it would upset the balance between the aim of the cultural exception and the offensive interest in audio-visual services to completely open up the sector to the free market. It would hence be up to policymakers to identify those instruments which are best suited to protect cultural diversity and pluralism in the EU audio-visual services sector without unnecessarily restricting trade. In that perspective, it has been noted that subsidies are the preferred policy tool because they seem effective, are economically preferable and are less trade distorting than

[70] For an extensive overview, see Graber, 'Audiovisual Media and the Law of the WTO' 24-47. Also see Footer and Graber 122-130; Roy, 'Beyond the Main Screen: Audiovisual Services in PTAs' 358-361; Loisen, *Overzicht van de Internationale Beleidscontext voor het Vlaamse Cultuur- en Mediabeleid (met Focus op Audiovisueel Beleid)* 14; Doyle 9-12. As concerns screen quotas, see the specific exemption from the GATT national treatment obligation in Articles III:10 and IV GATT. As concerns intellectual property rights, see for example Beviglia Zampetti 19-25. Considering the complexity of rules on intellectual property, we will not cover them in this contribution.

[71] The tax shelter is likely to be considered a subsidy as it is an incentive in the form of government revenue foregone. See S/WPGR/W/25/Add.6, Subsidies for Services Sectors: Information Contained in WTO Trade Policy Reviews - Background Note by the Secretariat (18 March 2013) para. 2.1.

other instruments.[72] Considering the foregoing, it was possibly a defensible decision by the European Commission to not exclude audio-visual services indefinitely from its negotiating mandate: it may prove more fruitful to first assess through which effective policies the digital environment needs to be addressed in order to actually protect cultural diversity without limiting the offensive interests of the EU audio-visual sector.

C.3 As a result of the EU treaties and the Lisbon reforms

The political viability of a compromise along the lines of what was suggested, i.e. explicitly protecting cultural diversity and pluralism but not excluding the entire audio-visual services sector (*supra)*, may be substantially weakened by claims subjecting and equating the audio-visual sector to the cultural exception. It should also be recalled that the negotiation and conclusion of agreements on trade in audio-visual services are subject to specific voting requirements in the Council. Article 207(4)(a) of the Treaty on the Functioning of the European Union (TFEU) states that the Council, in which a representative of each EU Member State has a vote, shall act unanimously in the field of trade in cultural and audio-visual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity. This requirement equally applies in case of a wider agreement that contains only some provisions related to trade in cultural and audio-visual services.[73] Hence, EU Member States retain a veto right in the decisions to authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.[74] French politicians have made reference to the use of their veto if audio-visual services are covered by TTIP.[75]

An unsolved question that may have an impact on reaching a compromise within the EU lies in the Lisbon Treaty reform, which granted explicit exclusive competence to the EU in matters of trade in services.[76] This raises questions as to the negotiation of differentiated specific commitments in RTAs by Member States. Considering an intra-EU split on trade in audio-visual services, this question may be especially poignant. However, the Lisbon reforms theoretically

[72] Cocq and Messerlin 26; Voon, 'A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS' 20-24; Burri-Nenova, 'Reconciling Trade and Culture: A Global Law Perspective' 12-13.
[73] This section benefited greatly from the input of Prof. Dr. Geert De Baere. See, by analogy, ECJ, Opinion 1/08 [2004] ECR I-11129 paras. 155-173.
[74] Article 218(2) TFEU.
[75] Embassy of France in London, 'Transatlantic Partnership/Cultural Exception – Communiqué issued by the Ministry of Culture' (2013) <http://www.ambafrance-uk.org/EU-deal-on-cultural-exception-a> accessed 25 February 2014.
[76] Article 3(1)(e) TFEU.

leave room for differentiated commitments for Member States, although this would need to be balanced with the principle of equality and the uniform application of the Common Commercial Policy.[77]

4. THE U.S. AND JAPAN, A SELECTION OF THEIR RTAS AND AUDIO-VISUAL SERVICES

In this section, we conduct a comparative analysis of four RTAs as concerns their application to and treatment of audio-visual services. Considering the EU's negotiations for an RTA with the U.S. and Japan, we assess respectively two U.S. and two Japanese RTAs as concerns obligations and commitments from the counterparties in the audio-visual services sector in the following sections.

Unsurprisingly, the U.S. is the largest exporter of audio-visual services and, in 2007, 60% of its exports went to the EU.[78] Moreover, the U.S. is the main proposer for increased liberalisation in audio-visual services and has been successful in pursuing this strategy in bilateral talks.[79] In a 2013 overview of foreign trade barriers relevant to its interests, the U.S. makes extensive reference to barriers in audio-visual services sectors,[80] which indicates further interest in opening up markets to American audio-visual services. Moreover, the top ten largest motion pictures firms by market share and box office revenue consists of eight U.S. firms (two of which are co-owned by respectively Australian and French firms), and two Japanese firms.[81] On the other side of the Pacific, Japan has sided with the U.S. in several aspects of the audio-visual services debate,[82] which for example shows in its specific commitments in GATS.[83] An illustration of Japan's status as an important player in audio-visual services is that, considering

[77] This section benefited greatly from the input of Prof. Dr. Geert De Baere. The European Commission could delegate the competence to negotiate differentiated commitments to the Member States, but they would then act as agents of the EU.
[78] S/C/W/310, Audiovisual Services (Background Note by the Secretariat 12 January 2010) 4-5, tables 2 and 3, although paras. 14-16 add caution to these exact numbers considering data-collection issues.
[79] Roy, 'Beyond the Main Screen: Audiovisual Services in PTAs' 363.
[80] Office of the United States Trade Representative, *2013 National Trade Estimate Report on Foreign Trade Barriers* (2013). See pp. 149-150 as concerns EU barriers. The relevant paragraphs are attached in Annex 1.
[81] Roy, 'Beyond the Main Screen: Audiovisual Services in PTAs' 343.
[82] For example as concerns the classification of downloads as 'virtual goods'. Pauwels and Loisen 301.
[83] S/C/W/310, Audiovisual Services (Background Note by the Secretariat 12 January 2010) 17-18, table 5. Although Japan has not, like the U.S., undertaken commitments in all six sub-sectors but only in three, it is still the only Member of large economic importance to have done so.

its relatively small population of about 125 million, it is noteworthy that the number of Japanese movies produced in 2008 is the third highest in the world. This resulted in a share of domestic films in cinemas of about 60%—putting Japan in the global top five in this regard.[84]

We start each subsection by briefly addressing each counterparty's interests in audio-visual services. Then, we address whether, how and to what extent the RTA applies to audio-visual services. Lastly, we analyse this application from the perspective of the protection of cultural pluralism.

A. The U.S. and Canada in NAFTA

Canada has a tradition of balancing its cultural sensitivities and economic interests with the U.S. and is in favour of wide regulatory autonomy to protect its cultural objectives.[85] Its audio-visual services policies, through an array of protectionist and promotional measures, have aimed at creating a Canadian market separate from the American and French markets.[86] Canada has done so through several policy instruments. For example, twenty years after the 1994 North-American Free Trade Agreement's (NAFTA)[87] came into force, the Canadian content requirements in programming expenditure and amount of programming in broadcasting are considered a serious barrier to trade in audio-visual services by the U.S.[88] Similarly, there is a quota for Canadian popular music selections in broadcast.[89] Canada equally played a leading role in the promotion of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[90]

As mentioned, the Canadian delegation sought to exclude audio-visual services from GATS negotiations in 1988.[91] Hence, unsurprisingly, Canada did not undertake specific commitments

[84] Ibid, table 4, and 9.
[85] Kim 212-215; Footer and Graber 119; Galt 922 at footnote 100 and the references there; Roy, 'Beyond the Main Screen: Audiovisual Services in PTAs' 362 362; Loisen, *Actorposities inzake Cultuur en Handel in Internationale Fora* 29.
[86] See Keith Acheson and Christopher Maule, *Canada - Audiovisual Policies: Impact on Trade* (Hamburg Institute of International Economics HWWA Report 228, 2003).
[87] North American Free Trade Agreement between the United States, Canada, and Mexico.
[88] Office of the United States Trade Representative 59.
[89] Ibid.
[90] Rachel Craufurd Smith, 'The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?' (2007) 1 International Journal of Communication 24, 27.
[91] Footer and Graber 119-120.

in its GATS schedule of specific commitments and listed several MFN exemptions.[92] Translating this to international trade means that, even today, for Canada, *"audio-visual services remain no-go zones in services trade."*[93] In NAFTA, Canada was able to negotiate a quite encompassing cultural industries exception. Although the position of Canada remains very relevant for the EU, considering they are undoubtedly allies in this debate, it should be stressed at the outset that NAFTA (and GATS) were negotiated in times very different from present day.

A.1 The cultural industries exception

NAFTA contains a general exception on cultural industries. Article 2107 NAFTA defines those as *inter alia* (i) the production, distribution, sale or exhibition of films and audio recordings, and (ii) all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services.[94] Hence, this definition of cultural industries aims to include mostly *"such cultural industries that, because of their public appeal, may affect the cultural identity of Canada."*[95] Article 2106 *juncto* Annex 2106 NAFTA holds that any measure adopted or maintained with respect to cultural industries shall be governed by the 1989 Canada-U.S. Free Trade Agreement (CUSFTA).[96] Article 2012 CUSFTA contains an identical definition of cultural industries to the one found in NAFTA, and Article 2005 (1) CUSFTA holds that cultural industries are exempt from the provisions of the agreement—with three limited exceptions.[97]

[92] GATS/SC/16, Canada: Schedule of Specific Commitments (15 April 1994); GATS/EL/16, Canada: Final List of Article II (MFN) Exemptions (15 April 1994).

[93] Sauvé 23.

[94] NAFTA Article 2107 reads:

> *"For purposes of this Chapter:*
> *cultural industries means persons engaged in any of the following activities:*
> *(a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;*
> *(b) the production, distribution, sale or exhibition of film or video recordings;*
> *(c) the production, distribution, sale or exhibition of audio or video music recordings;*
> *(d) the publication, distribution or sale of music in print or machine readable form; or*
> *(e) radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services;"*

[95] Cahn and Schimmel 290-291.

[96] With the exception of NAFTA Article 302 on tariff elimination in trade in goods.

[97] The first exception relates to Article 401 CUSFTA on tariff elimination in trade in goods. The second refers to Article 1607 (4) CUSFTA on the case where Canada requires the divestiture of an enterprise in the cultural industries that has been indirectly obtained by a U.S. investor. In that case, Canada must

More importantly, the exemption is limited by Article 2005 (2) CUSFTA, which holds that actions by a party which would violate CUSFTA (or NAFTA) were it not for the exemption, could be countered by the other party through a measure of equivalent commercial effect. This *"tit-for-tat"* type retaliation mechanism appears to remain more of a diplomatic leverage mechanism than a source of formal retaliation.[98] The provision may nonetheless have a chilling effect, i.e. discouraging taking certain measures under the threat of retaliation, although it should be stressed that it only applies in case the measure regarding the cultural industries violates Canadian obligations under NAFTA. Moreover, its scope is subject to debate.[99] Hence, the cultural exception clause should perhaps be seen more as an exception, as its place in NAFTA Chapter 20 indicates, than an exemption.[100] If Canadian policymakers deem a measure is warranted even though it violates Canadian NAFTA obligations, the least favourable outcome is equivalent retaliation—and not a dispute which may lead to the requirement of bringing Canadian law in accordance with its obligations or potentially higher than equivalent compensation.[101]

If one compares the scope of NAFTA's cultural industries exception insofar it covers audio-visual services to the EU's practice of excluding the audio-visual services sector, it should be noted that the NAFTA exception is more detailed but both largely coincide. It is however unclear how and whether new technologies may fit in the cultural exception in NAFTA.[102] Hence, there may be some room to argue that NAFTA could cover certain audio-visual services, especially considering that NAFTA obligations on services apply to all services,[103] except those listed in

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offer a market value compensation for the divestiture. The third exception, listed in Article 2006 CUSFTA, relates to copyright laws for the remuneration of retransmissions.

[98] The U.S. has made use of this provision, for example in the context of the revocation by the Canadian Radio-television Telecommunications Commission of a license of a U.S. music radio station. See Patricia M Goff, *Limits to Liberalization: Local Culture in a Global Marketplace* (Cornell University Press 2007) 127-128. Also see, for example, Ronald G Atkey, 'Canadian Cultural Industries Exemption from NAFTA: It's Parameters' (1997) 23 Canada-United States Law Journal 177.

[99] See, for a summary of positions, Cahn and Schimmel 308-310.

[100] An exemption exempts a measure from the scope of an agreement or an obligation. An exception presupposes that a measure falls within the scope of the agreement and the obligation and that the obligation is breached. Subsequently, an exception may remedy such a violation.

[101] According to Article 2018 (2) NAFTA, wherever possible, the resolution of a dispute shall be non-implementation or removal of a measure not conforming with or causing nullification or impairment of NAFTA. Failing such a resolution, the resolution may be made through compensation. In the case of 2005 (2) CUSFTA, a dispute would automatically be resolved through compensation, which is moreover limited to be equivalent.

[102] Cahn and Schimmel 291.

[103] Except financial services, which are subject to specific provisions in Chapter 14, air services, government procurement services and subsidies. See NAFTA Article 1201.

Canada's schedule in Annexes I, II or V, which contain no reference to audio-visual services. Hence, the schedule follows the negative listing approach. Consequently, measures relating to such services would need to comply with NAFTA's cross-border trade in services obligations on national treatment, MFN treatment and non-discriminatory measures such as but not limited to quantitative restrictions, licensing requirements and performance requirements. Notably, subsidies or grants provided by a party or a state enterprise, including government-supported loans, guarantees and insurance are not covered by the provisions on cross-border trade in services and investment.[104] Similarly, measures relating to such audio-visual services not covered by the cultural industries exception would need to be in accordance with the obligations protecting investment on national treatment, MFN treatment, minimum standard of treatment, performance requirements, nationality requirements for senior management and boards, transfers relating to an investment or investor, and expropriation. As concerns investment, the exception for subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance is limited to the national treatment, MFN treatment and nationality requirements for senior management and boards.[105] The agreement also contains some limited provisions on competition policy related to trade in services and investment, including designated monopolies and state enterprises.[106]

If a measure were the fall outside the cultural industries exception and consecutively violate an obligation contained in NAFTA, it could still be justified on the basis of its legitimate policy goal. The general exceptions clause for measures affecting trade in cross-border services and telecommunications, which predates Article XIV GATS, only contains exceptions for measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection insofar they do not violate the chapeau of the exceptions clause.[107]

A.2 Appraisal

Canada managed to integrate exceptional treatment for its cultural industries into NAFTA. The pragmatic definition of cultural industries in the agreement does not cover all audio-visual services. Moreover, considering its twenty year anniversary, it is unsurprising that the definition

[104] Ibid.
[105] Ibid Chapter 11.
[106] Ibid Chapter 15.
[107] Ibid Article 2102(2).

of cultural industries does not solve the classification issued addressed above. An inflexible listing of exempted services may be unfitted with the tempo of technological advances. A forward looking definition would be required to do so. Furthermore, although there is some discussion on the scope of retaliatory measures which the U.S. may take if Canada makes use of the cultural industries exception, it seems that the 'equivalent commercial effect' provision is used sparingly. However, the retaliatory provision appears flawed to distinguish measures that do contribute to these goals from others. Moreover, the cultural industries exception and the retaliatory provision may be perceived as a symbolic adoption of culture as a commodity. In that regard, reforming it to be more like a cultural exception in the sense of Article XIV GATS or XX GATT could be a better option although care should be taken to determine the modalities of the exception.[108]

On the one hand, the cultural industries exception is the most far-reaching protection of the audio-visual services sector in the four case studies under scrutiny. On the other hand, the exception is not necessarily solely focused on the goal of promoting diversity and pluralism but is sweeping. In that sense, it favours industries with defensive interests that would not be covered by a true cultural exception. Considering the approach taken by the European Commission in the TTIP mandate and the U.S.' strong offensive interests, it may not be very likely that such a sweeping exception would be part of TTIP.

B. KORUS

Since the 1990s, the Republic of Korea (hereafter Korea) has a strong domestic audio-visual industry, ranking eighth worldwide in terms of the number of films produced in 2008, which resulted in a share of domestic films of 32% of all released films in 2010.[109] Moreover, the market share of Korean films was 46% in 2010, whilst other non-Hollywood movies only accounted for about 5%.[110] The Korean broadcasting industry, which includes radio and television stations, cable TV, satellite TV, digital multimedia broadcasting, internet protocol TV and *"program providers that create content or have acquired the right to broadcast taped*

[108] For example, should a measure be 'necessary for' or merely 'relating to' the protection of cultural diversity and pluralism?
[109] Yeongkwan Song, *Audiovisual Services in Korea: Market Developments and Policies* (Asian Development Bank Institute Working Paper N° 354, 2012) 3-6.
[110] Ibid 8-9, tables 6 and 7.

television and radio programs", has embraced technological innovations.[111] The Korean GATS schedule of specific commitments includes full commitments for Modes 1, 2 and 3 for subsectors (a) motion picture and video tape production and distribution services and (e) record production and distribution services (sound recording).[112] Korea did not list any MFN exemptions related to audio-visual services.[113] This indicates that Korea has a quite open policy as concerns audio-visual services. However, the country is also one of few making use of screen and broadcasting quotas, which were a thorn in the flesh of those in favour of liberalisation in the audio-visual services sector.[114] However, Korea has undertaken commitments on audio-visual services in the 2012 U.S.-Korea RTA (KORUS)[115] which go far beyond its WTO commitments—for example by halving cinema screen quotas.[116] Nonetheless, although its GATS commitments are quite extensive for film and sound recording services, Korea appears to be the U.S.' RTA partner that maintained most reservations on television and radio services.[117]

B.1 KORUS obligations apply to audio-visual services

KORUS does not contain a cultural exception or an exception for audio-visual services. Its Chapter 12 covers measures affecting trade in cross-border services, with the exception of subsidies or grants provided by Korea or the U.S., including government-supported loans, guarantees, and insurance.[118] Consequently, trade in audio-visual services is largely subject to the disciplines of this chapter. The measures must conform to obligations on national treatment, MFN treatment, market access and local presence requirements.[119] Consequently, as concerns for example the screen and broadcast quotas, the U.S. considers that *"KORUS protects against*

[111] Ibid 9-12.
[112] GATS/SC/48, Korea: Schedule of Specific Commitments (15 April 1994).
[113] GATS/EL/48, Korea: Final List of Article II (MFN) Exemptions (15 April 1994).
[114] Song 16 16-17. Also see, for example, Byung-il Choi, 'When Culture Meets Trade: Screen Quota in Korea' (2003) 31 Global Economic Review 75.
[115] Free Trade Agreement between the Republic of Korea and the United States of America.
[116] Roy, 'Beyond the Main Screen: Audiovisual Services in PTAs' 362-363, 367 and 370; Loisen, *Actorposities inzake Cultuur en Handel in Internationale Fora* 60 60-61; Loisen and De Villé, 'The EU-Korea Protocol on Cultural Cooperation: Toward Cultural Diversity or Cultural Deficit?' 254-255. The U.S. still considers the remaining Korean screen and broadcast quotas, and restrictions on voice-overs and local advertisements as significant barriers to trade in audio-visual services. See Office of the United States Trade Representative 238.
[117] Roy, 'Beyond the Main Screen: Audiovisual Services in PTAs' 362-363, 367 and 370.
[118] KORUS Article 12.1(4)(d).
[119] Ibid Articles 12.2, 12.3, 12.4 and 12.5.

increases in the amount of domestic content required and ensures that new platforms, such as online video, are not subject to these legacy restrictions."[120] Whether the Korean quotas apply to new platforms is dependent on the exact way in which they are formulated. Annex I specifies those measures exempted from one or more of the four aforementioned obligations. This signals the use of a negative list approach. For the sectors and activities listed in Annex II, Korea may maintain existing, or adopt new or more restrictive, measures that do not conform with these obligations.

Regarding investment, Chapter 11 of KORUS contains obligations on national treatment, MFN treatment, minimum standards of treatment, expropriation and compensation, transfers, performance requirements, and nationality requirements for senior management and board of directors.[121] Annex I again specifies existing measures that may be inconsistent with the obligations on national treatment, MFN treatment, performance requirements and nationality requirements for senior management and board of directors. Similarly, Annex II contains sectors and activities for which measures that do not conform with these obligations may be maintained or new or more restrictive ones may be adopted. With the exception of the provision on performance requirements, the last mentioned obligations do not apply to subsidies or grants provided by a party, including government-supported loans, guarantees, and insurance.[122]

In addition to the obligations on investment and cross-border trade in services, KORUS contains relevant obligations for telecommunications services,[123] electronic commerce, which is explicitly subject to the chapters on investment and trade in services,[124] and competition.[125] Notably, the annexes do not exempt measures from these obligations.

Measures which violate the obligations of KORUS may still be justified by the exceptions contained in the agreement. Most importantly, the general exception clause of Article XIV GATS is incorporated *mutatis mutandis* in KORUS as concerns the chapters on cross-border trade in services and electronic commerce.[126] There is however no such general exceptions provision for the provisions on investment.

[120] Office of the United States Trade Representative 238.
[121] KORUS Articles 11.3, 11.4, 11.5, 11.6, 11.8 and 11.9.
[122] Ibid Article 11.12(2).
[123] Ibid Chapter 14.
[124] Ibid Chapter 15, especially Article 15.2.
[125] Ibid Chapter 16.
[126] Ibid Article 23.2.

B.2 Exemptions for audio-visual services in the Annexes

As noted, Annex I contains exemptions from two sets of obligations for existing measures. First, as concerns cross-border trade in services, measures listed in the annex are exempted from national treatment, MFN treatment, market access and local presence requirements obligations. Second, regarding investment, the same goes for the obligations on national treatment, MFN treatment, performance requirements and nationality requirements for senior management and board of directors. The exemptions only apply to the obligations listed in their entry. In the case of audio-visual services, the following exemptions are relevant.

Foreign news agency services may only supply news communications under a contract with a news agency organised under Korean law which has a radio station license. Moreover, foreign governments, foreign persons, Korean companies without a Korean CEO or president, who also needs to be domiciled in Korea, or with a foreign person holding 25% or more of the shares may not supply news agency services. Foreign nationals, companies or governments may not obtain a radio station license.[127]

The CEO or president of a foreign company, even if she is a Korean national, may not serve as CEO, president or chief programmer of several types of broadcasting companies.[128] Moreover, licenses for terrestrial broadcasters, cable system operators, satellite broadcasting operators, signal transmission networks, business operators or program providers may only be granted to or held by a Korean government or a Korean juridical person. Foreign persons and government may not hold more than 49% of stocks or equity interests in broadcasters, operators and program providers.[129]

Broadcasting quotas exist, both covering overall Korean content and genre-specific Korean content, for terrestrial broadcasters, program providers, cable system operators, satellite broadcasting operators and satellite digital multimedia broadcasting operators. Certain separate content quota requirements apply to a terrestrial digital multimedia broadcasting operator. Nonetheless, Korea is obliged to permit that no less than 80% of a terrestrial broadcaster's, cable system operator's, satellite broadcasting operator's or program provider's quarterly programming hours of foreign content per genre are foreign content of a single country. Screen

[127] Ibid 543-544.
[128] Namely terrestrial broadcasters, satellite broadcasting operators, cable system operators, program providers, signal transmission network business operators, audio cable operators, or relay-only cable operators.
[129] KORUS 549-550.

quotas oblige cinema operators to project Korean motion pictures for at least 73 days per year at each screen in Korea.[130]

Annex II lists measures that do not conform with these obligations but may nonetheless be maintained. New or more restrictive measures may equally be adopted if covered by these limitations. The Korean schedule includes a blanket provision that limits the market access obligation for cross-border trade in services to the scope of Korea's schedule for Article XVI GATS.[131] The Annex also includes a general exemption from MFN treatment for the application of reciprocity measures or international agreements involving sharing of the radio spectrum, guaranteeing market access or national treatment with respect to the one way satellite transmission of direct-to-home and direct broadcasting satellite television services and digital audio services.[132]

Korea equally reserved the right to adopt or maintain any measure that (i) limits cross-ownership among media sectors; (ii) as concerns program providers engaged in multi-genre programming, news reporting or home-shopping, sets the minimum percentage of issued stocks or equity interest that serves as a threshold to determine whether a juridical person is foreign or Korean; (iii) requires the members of the board of directors of the supplier of broadcasting services to be Korean nationals or residents; (iv) requires a platform operator to retransmit a terrestrial broadcasting channel or to transmit a public interest channel; (v) with respect to a terrestrial broadcaster or a program provider that primarily provides animation programming or is engaged in multi-genre programming, requires a certain percentage of annual programming hours to be newly produced Korean animation; (vi) imposes an outsourced production content quota, expenditure requirement for Korean production, or prime time quota; (vii) requires a supplier of broadcasting services that provides video on demand services to store a certain percentage of Korean content, provided that such a requirement does not result in the storage of videos for which there is negligible consumer demand; or (viii) as concerns suppliers not approved at the signing of KORUS, restricts or prohibits foreign retransmitted broadcasting services (including foreign cable channels) in a specific category.[133]

Furthermore, Korea reserves the right to adopt or maintain any measure with respect to a supplier of subscription based video services, as part of future regulatory reforms in the

[130] Ibid 551-552 and 555.
[131] Ibid 582.
[132] Ibid 585.
[133] Ibid 597-599.

broadcasting and telecommunications sectors that may violate, as concerns investment, performance requirements, national treatment and senior management and boards of directors obligations, and as concerns cross-border trade in services, national treatment, market access and local presence obligations.[134]

The Korean schedule exempts preferential co-production arrangements for film or television productions from both MFN treatment obligations and the performance requirements obligation.[135]

Lastly, as concerns both national treatment obligations and the performance requirements obligation, Korea also reserves the right to adopt or maintain any measure setting criteria for determining whether broadcasting or audio-visual programs are Korean.[136] Regarding digital audio or video services,[137] measures ensuring that access to Korean digital audio or video content or genres thereof is not unreasonably denied to Koreans, and as concerns such services targeted at Korean consumers, measures promoting the availability of such content.[138]

B.3 Appraisal

The Korean commitments and exemptions paint a complex picture that is hard to analyse without in-depth knowledge of domestic Korean audio-visual policies. The negative listing approach contributes to relatively extensive commitments as all unscheduled measures are considered covered by the obligations. The approach may also have a lock-in effect where new services are submitted to the obligations of the agreement.

However, Korea has also negotiated extensive limitations. Notably, the exclusion of subsidies from the scope of the obligations may be very important from a policymaking perspective. (This equally holds true for many other areas of services policies.) The licensing system, combined with foreign equity caps, limits to cross-ownership and nationality requirements for top-level personnel indicate Korea's commitment to having Korean companies in control. This approach puts some of the responsibility in the hands of the private sector, as individual entrepreneurs

[134] Ibid 600-601.
[135] Ibid 602.
[136] Ibid 603.
[137] Defined as 'a service that provides streaming audio content, films or other video downloads or streaming video content regardless of the type of transmission', but not including broadcasting services as defined by the Korean Broadcasting Act.
[138] KORUS 606.

may nonetheless decide to not focus on cultural pluralism. This is not the case for screen quotas, which are an enforceable and, on report, watertight way of securing such pluralism. The outsourced production content quota and expenditure requirements for Korean productions play similar roles. The question is however how they function vis-à-vis technological advances. Notably, the Korean schedule imposes content quota for video on demand with the qualification that this doesn't lead to the storage of videos which are not in demand by consumers. It thus remains to be seen how effective such quotas will be when facing competition from foreign content. A clever limitation is that for future regulatory reforms of subscription based video services. This type of functionally limited and forward looking limitations may prove key in addressing the classification issues and providing legal certainty.

C. The Japan-Switzerland RTA

Considering its three official languages and position at the heart of Europe, Switzerland has extensive experience with cultural pluralism. Its audio-visual culture is very comparable to that of several EU Member States. The example of Switzerland is also notable considering a Swiss 2001 Communication in the context of the Doha Round of negotiations.[139] The Communication, circulated in the WTO's Council for Trade in Services, contained a proposal on trade in audio-visual services that attempted to reconcile commercial interests in the audio-visual sector and the cultural sensitivities related to it. The proposal appeared aimed at bridging the gap between the EU and U.S. positions—India seemed to underwrite a similar stance as well.[140] It noted that the ideological differences on audio-visual policymaking could be overcome by addressing the individual concerns of Members in the form of limitations on market access and national treatment obligations.[141] Notably, the Communication also points at the relevance of competition policy to further both economic and cultural interests.[142] Perhaps surprisingly, considering the Communication, the Swiss GATS schedule of specific commitments contains no commitments on audio-visual services.[143] The Swiss list of MFN exemptions comprises three entries related to audio-visual services, which aim at the promotion of cultural objectives and at regulating access

[139] S/CSS/W/74, Communication from Switzerland: GATS 2000: Audio-visual Services (4 May 2001).
[140] Pradip Thomas, 'GATS and Trade in Audio-Visuals: Culture, Politics and Empire' (2003) 38 Economic and Political Weekly 3485, 3487.
[141] S/CSS/W/74, Communication from Switzerland: GATS 2000: Audio-visual Services (4 May 2001) para. 9.
[142] Ibid para. 15. Also see Roy, 'Audiovisual Services in the Doha Round: *"Dialogue de Sourds, the Sequel?"*' 931.
[143] GATS/SC/83, Switzerland: Schedule of Specific Commitments (15 April 1994).

to the small Swiss market in order to preserve diversity of supply. The relevant measures relate to access to funding and distribution, granting the benefits of support programmes and the allocation of screen time, and the granting of concessions.[144]

C.1 RTA obligations apply to audio-visual services

The 2009 agreement between Switzerland and Japan (Japan-Switzerland RTA)[145] does not explicitly address audio-visual services. It neither contains a cultural exception of sorts. Chapter 6, regulating trade in services, covers audio-visual services. Obligations to accord MFN and national treatment apply, as does a market access obligation.[146] All three obligations apply to all sectors but are limited by the reservations listed in Annex III, signalling the use of a negative list approach.[147] The Japan-Switzerland RTA also contains a binding provision on domestic regulation, but it is limited to the sectors for which GATS commitments have been scheduled (although not subject to the limitations therein. This approach is alike GATS' conditional general obligations).[148] As noted, this is not the case for Switzerland with regards to audio-visual services. Interestingly, the chapter of the agreement on services does not exclude subsidies from its scope. Hence, subsidies should be treated as all other services, as is the case under the GATS regime.[149] Scheduled limitations may nonetheless exempt subsidies from the scope of the MFN, market access and national treatment obligations.

Chapter 6 contains a general exceptions clause modelled after Article XIV GATS, with both a closed list of legitimate objectives and a chapeau to avoid abuse.[150] The exception for measures securing the compliance with domestic laws explicitly refers to such laws which aim at protecting the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.[151]

[144] GATS/EL/83, Switzerland: Final List of Article II (MFN) Exemptions (15 April 1994).
[145] Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation.
[146] Ibid Articles 45-47.
[147] It was the first Japanese RTA in which market access commitments are also approached in this way. Trade and Industry of Japan Ministry of Economy, *Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA, BIT* (2011) 782-783.
[148] Japan-Switzerland RTA Article 48.
[149] See Article XV GATS; Gilles Gauthier, Erin O'Brien and Susan Spencer, 'Déjà Vu, or New Beginning for Safeguards and Subsidies Rules in Services Trade?' in Pierre Sauvé and Robert M Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (Brookings Institution 2000) 177.
[150] Japan-Switzerland RTA Article 55.
[151] Ibid Article 55(c)(ii).

In addition to the provisions on trade in services, the Japan-Switzerland RTA includes a chapter on measures affecting electronic commerce for both goods and services.[152] The principle of technological neutrality, i.e. that the supply of services transmitted electronically is not discriminated against vis-à-vis other methods of service supply, is explicitly affirmed.[153] The reservations of Annex III apply *mutatis mutandis* to the non-discrimination and market access provisions of this chapter,[154] as does the general exceptions clause of Chapter 6.[155]

Furthermore, the agreement includes provisions on the protection of investment.[156] The obligations to accord fair and equitable treatment and full protection and security to investments of investors of the other party and regarding expropriation are not limited by reservations.[157] This is, on the other hand, the case for the MFN and national treatment obligations.[158] The applicable list of reservations is not Annex III but Annex IX. As concerns Switzerland, this annex mostly refers back to Annex III.[159] Thus, in practice, there is only one relevant Annex, which contains limitations that apply to both Chapters 6 and 9. Finally, Chapter 10 of the Japan-Switzerland RTA contains some disciplines on competition.

If a measure were to violate any of the obligations contained in the agreement, it may still be justified on the basis of, in the case of audio-visual services, the general exceptions clauses. In the case of Chapter 6 and as concerns electronic commerce,[160] this is Article 55. The chapeau of the provision and the list of legitimate policy goals are substantially identical to that of Article XIV GATS. Concerning investment, Article 95 explicitly incorporates, *mutatis mutandis*, Article XIV GATS into the RTA. [161]

[152] Ibid Chapter 8.
[153] Ibid Articles 71.2 and 74.
[154] Ibid Articles 73 and 75.
[155] Ibid Article 83.
[156] Ibid Chapter 9.
[157] Ibid Articles 86 and 91-92.
[158] Ibid Articles 87 and 88.
[159] There are some additional reservations regarding investment in services in Annex IX, but none apply specifically to audio-visual services. Some horizontal limitations could have an impact on specific measures affecting trade in audio-visual services, but addressing them would lead us too far.
[160] Japan-Switzerland RTA Article 83 Article 83.
[161] Ibid.

C.2 Exemptions for audio-visual services in Annex III

As noted in the previous section, the most important obligations in the Japan-Switzerland RTA are (mostly) limited by one list of exceptions in Annex III for both trade in services and investment.[162] Several limitations are relevant for or apply specifically to audio-visual services. Foremost, as concerns national treatment, Switzerland reserved the right to adopt and maintain subsidies, tax incentives and tax credits not inconsistent with their GATS obligations. Considering that Switzerland made no specific commitments on audio-visual services in GATS, it may adopt measures granting these types of more favourable treatment to its own service suppliers.

The Swiss schedule refers to specific domestic legal provisions which differentiate between broadcasting services and telecommunications services. Based on these distinctions, the schedule contains a blanket limitation for non-conforming measures affecting programme transmission services, radio and television cable services and radio and television services.[163] As a protection mechanism for 'new' or residual services, the schedule contains an explicit provision for specific services. If specific services are not mentioned in the CPC classification but are considered to fall within one of its residual categories, possible measures affecting such services are not necessarily listed.[164] A related but more specific provision addresses new audio-visual services in several subsectors. They are: programme transmission services; radio and television cable services; motion picture and video production and distribution services; motion picture projection services; radio and television services; other entertainment services; other recreational services and internet-based services. It is stated that for new services—i.e. services that are not currently delivered on the Swiss market in these subsectors—Switzerland reserves the right to adopt any measures. As concerns establishment, such measures shall grant national treatment, but this does not apply to cross-border trade in services.[165]

Switzerland reserves the right to maintain, modify or adopt any measures restricting market access or national treatment for video tape and motion picture related services on the grounds of public morals or protection of individuals. This applies in particular, but appears not limited to, to sexual, obscene, or violent contents.[166] With regard to internet services, similar measures may be taken for the protection of youth or for the prevention of addiction or compulsive

[162] As noted *supra* in section C.1, the limitations are only relevant for certain obligations.
[163] Reservation 30 of Appendix 2 to Annex III.
[164] Reservation 102 of Appendix 2 to Annex III.
[165] Reservation 103 of Appendix 2 to Annex III.
[166] Reservation 48 of Appendix 2 to Annex III.

behaviour and other mental health hazards.[167] Similarly, Switzerland explicitly reserved the right to ban the advertisement of tobacco products and medicinal products only available on prescription and restrict the advertisement of alcoholic beverages in radio, television and other programme transmission services.[168]

The Swiss motion picture industry is safeguarded by a reservation for motion picture or video tape production services, motion picture or video tape distribution services, and motion picture projection services. The reservation contains the right to treat audio-visual works covered by co-production agreements more favourably. Measures granting benefits under support programmes, such as MEDIA and EURIMAGES, are equally exempted from the MFN and national treatment obligations. This also applies to measures relating to the allocation of screen time which implement arrangements such as the Council of Europe Convention on trans-frontier television. Lastly, Switzerland reserved the right to confer more favourable treatment to audio-visual works and suppliers of audio-visual services meeting specific European origin criteria.[169]

As concerns licensing for programme transmission services, radio and television cable services and radio and television services, licences may not be granted to a juridical person under foreign control, to a Swiss juridical person with foreign capital participation or to a natural person who does not have Swiss nationality if reciprocity is not granted. Furthermore, there is a maximum number of licences per broadcasting company (independent of the company's origin).[170]

In the television broadcast transmission services, television cable services, television programming services and combined television programme making and broadcasting services subsectors, television broadcasters with a national or regional language programme service are obliged to reserve at least 50% of their broadcasting time for Swiss or European productions and are obliged to reserve at least 10% of their broadcasting time or of their production costs for works from independent Swiss or European producers. Moreover, such television broadcasters

[167] Reservation 100 of Appendix 2 to Annex III.
[168] Reservation 57 of Appendix 2 to Annex III.
[169] Reservation 82 of Appendix 2 to Annex III.
[170] Reservation 31 of Appendix 2 to Annex III.

which broadcast films must spend at least 4% of their gross revenue on purchase, production or co-production of Swiss films or must pay a corresponding support fee of up to 4%.[171]

The Swiss schedule contains a reservation for motion picture or video tape distribution services which, in order to guarantee linguistic diversity, requires that a same film may only be distributed by a film distribution enterprise once the company possesses the rights for all language versions of the film for the entire territory of Switzerland.[172]

On similar grounds of insufficient diversity as well as quality of cinematic offerings, incentive fees may be levied to promote such diversity. Additionally, only natural persons domiciled in Switzerland or juridical persons established in Switzerland, if all board members are domiciled in the country, may show or distribute films intended for public projection. These persons must also be registered in a public register.[173] These measures are linked to the Federal Constitution of Switzerland, which reads in relevant part:

> *"1 The Confederation may encourage Swiss film production and film culture.*
>
> *2 It may issue regulations to promote the diversity and the quality of the cinematographic works that are offered."*[174]

Lastly, the exhibition or projection of films in cafés, restaurants, discotheques, nightclubs and similar premises may be prohibited or subject to authorisation which may violate market access or national treatment obligations.[175]

C.3 Appraisal

Considering that Switzerland did not make commitments in audio-visual services in GATS, it is notable that it did undertake commitments in this RTA. From the point of view of the EU, this is useful as it highlights how to partially liberalise the sector whilst protecting defensive interests. Some of the techniques used in Switzerland's schedule merit analysis.

[171] Reservation 32 of Appendix 2 to Annex III. This obligation also applies to foreign television broadcasters which offer windows of national or regional language programme services in Switzerland and which offer feature, documentary and animation films in their respective programmes.
[172] Reservation 83 of Appendix 2 to Annex III.
[173] Reservation 84 of Appendix 2 to Annex III.
[174] Article 71 of the Swiss Constitution (SR101).
[175] Reservation 85 of Appendix 2 to Annex III.

The limitation that allows Switzerland to grant discriminatory subsidies permits the use of a powerful and economically preferable policy instrument. The blanket limitation for programme transmission services, radio and television cable services and radio and television services has the effect of excluding specific sub-sectors from the scope of the market access and national treatment obligations.

An important limitation is the forward-looking CPC code reservation. However, it may be insufficiently detailed to address all of the classification issues as noted above as it does not cover new services which may be classified under existing CPC codes. Therefore, the additional but sub-sector specific limitation for services that are not currently delivered on the Swiss market in these subsectors is an interesting instrument. It is forward looking but does require Swiss regulators to know in sufficient detail which services are currently being delivered on the Swiss market. Nonetheless, it allows *ex post* regulation that does not comply with the obligations in the Japan-Switzerland RTA for any new service. The weak spot of the provision may be the definition of 'new service'. For example, as noted above some services use various technical means to supply a similar service. Does this create a new service? It would be useful to add some guidance as to how 'new' service should be interpreted.

The license cap per company is a safeguard against horizontal integration and monopolisation of the market. The limitations related to co-production and European works are clear indications of a Swiss policy that aims at protecting domestic and European film industries. This equally applies to foreign ownership and control limitations, and to screen quotas and local content requirements for European and Swiss works. The incentives for diversity as well as quality of cinematic offerings have similar aims. The anchoring of these objectives in the case of film in the Swiss constitution is notable. Moreover, all of these limitations are clearly focused on cultural pluralism. They award policymakers with a relatively clear set of policy instruments that may be used to promote specific audio-visual services sectors. An analysis of their effectiveness in practice could be very valuable for the EU's negotiation leeway on audio-visual services.

D. The Japan-India RTA

The large Indian economy is home to over 1,2 billion potential consumers.[176] Its audio-visual sector is successful, fast-growing and thus has large offensive interests,[177] *inter alia* in exporting to Indians abroad. However, India has also expressed its wish to maintain its 'cultural identity'.[178] Although for now, Indians seem to prefer Indian audio-visual content, this natural protectionist sentiment is eroding and imported audio-visual content is gaining popularity. The relative openness of the market, which lacks for example subsidies, would seem to play an important role in both these aspects of the Indian audio-visual services sector, as it may on the one hand speed up Americanisation as well as on the other hand help solidify India as a major global player.[179]

The Indian GATS schedule of specific commitments only contains relevant commitments for motion picture or video tape distribution services as concerns Mode 3. The market access commitments are limited as the number of import titles is restricted to 100 per year and the services can only be supplied through representative offices. The national treatment commitments are equally subjected to limitations. In order to be granted national treatment, the motion picture must have either won an award or participated in an international film festival notified by the Indian government, or received good reviews in prestigious film journals notified by the Indian government.[180] The apparent purpose of such limitations is to both restrict the import of foreign films as ensure the cinematographic quality of imports. India equally scheduled an MFN exemption for audio-visual services which is aimed at the promotion of cultural exchange. According to the exemption, the MFN obligation does not apply to measures which define norms for co-production of motion pictures and television programmes with foreign countries insofar they grant national treatment to motion pictures and television programmes co-produced with foreign countries which maintain a co-production agreement with India. The

[176] Gauri Khandekar and Jayshree Sengupta, *EU-India Free Trade: Make or Break* (FRIDE Agora Asia-Europe Policy Brief 10, 2012) 5.
[177] Roy, 'Beyond the Main Screen: Audiovisual Services in PTAs' 374. For an extensive overview of Indian potential in audio-visual services, see Arpita Mukharjee, *India's Trade Potential in Audio-visual Services and the GATS* (Indian Council for Research on International Economic Relations Working Paper N° 81, 2002).
[178] Footer and Graber 119.
[179] Loisen, *Actorposities inzake Cultuur en Handel in Internationale Fora* 33 33-36. For example, between 2000 and 2008, Indian films made up over 90% of total box office revenue in India. Moreover, India produced the highest number of feature films in the world between 2004 and 2008, outnumbering the U.S. by a factor 2.5 in 2008. Ibid 59 and 61.
[180] GATS/SC/42, India: Schedule of Specific Commitments (15 April 1994).

exemption applies to all relevant audio-visual services and can be applied to any beneficiary third country.[181] This limitation is similar to that of Switzerland discussed above.

D.1 RTA obligations apply to audio-visual services

The scope of India's 2011 agreement with Japan (Japan-India RTA)[182] does not exclude audio-visual services. For the purpose of audio-visual services, Chapter 6 of the agreement has the same scope as GATS: it applies to all measures affecting trade in services—i.e. the supply of a service through one of four modes of supply.[183] The market access and national treatment commitments in the agreement are, unlike KORUS and the Japan-Switzerland RTA, based on a positive list approach.[184] The commitments, and limitations thereto, are scheduled in Annex 6. The chapter also contains a non-binding MFN provision. The domestic regulation provision mirrors Article VI GATS and contains, aside from a negotiating mandate, only a standstill provision. As concerns subsidies, an obligation to consult applies. Notably, the dispute settlement procedures do not apply to the provision. Consequently, it seems that subsidies which violate the obligations under the agreement cannot be adjudicated upon.

Chapter 8 applies to measures relating to investors of a party and to their investments. The national treatment, MFN and prohibition of performance requirement obligations apply to all investments covered by the chapter, except to non-conforming measures listed in Annex 8 and to sectors listed in Annex 9. Additionally, a general fair and equitable treatment applies unconditionally.

For the purposes of Chapters 6 and 8, Article XIV GATS is incorporated into the agreement and applies *mutatis mutandis*.[185]

Competition policy is the subject of Chapter 11, which obliges the parties to take measures which it considers appropriate against anticompetitive activities, in order to facilitate trade and investment flows. Therefore, each Party must apply its competition laws and regulations in a manner which does not discriminate between persons in like circumstances on the basis of their nationality. Again, the dispute settlement procedures do not apply to the provision.

[181] GATS/EL/42, India: Final List of Article II (MFN) Exemptions (15 April 1994).
[182] Comprehensive Economic Partnership Agreement between Japan and India.
[183] Ibid Article 57.1.
[184] Ibid Articles 59 and 60.
[185] Ibid Article 11.2.

D.2 Exemptions for audio-visual services in Annexes 6, 8 and 9

Annex 6 contains the commitments and limitations thereon for Chapter 6 of the Japan-India RTA. A horizontal market access limitation for Mode 3 states that in certain sectors, the Foreign Investment Promotion Board needs to approve the investment. This is not the case for any audio-visual services.[186] For national treatment in Mode 3, a horizontal limitation is scheduled for subsidies, which shall be available only to domestic service suppliers.

For both market access and national treatment in Mode 3, limitations listed in the Indian Consolidated FDI Policy Circular 2 of 2010, and any updates thereof, shall be applicable.[187] The Circular contains several relevant limitations. There is a 20% FDI cap for terrestrial broadcasting (FM radio) services. These services are also *"subject to such terms and conditions as specified from time to time"* by the Indian government for the permission for setting up of FM radio stations.[188] A 49% FDI cap applies for cable networks services and direct-to-home services, which are also *"subject to conditions as specified from time to time by the Indian government"*.[189] The FDI limit in headend-in-the-sky broadcasting services is 74%, and these services are again *"subject to guidelines, terms and conditions as specified from time to time by the Indian government"*.[190] The setting up of hardware facilities services such as up-linking HUB/Teleports, up-linking non-news & current affairs TV channels, and up-linking news & current affairs TV channels is also subject to various FDI limits. FDI for up-linking TV channels will be subject to compliance with the Up-linking Policy of the Indian government. The companies permitted to uplink the channel shall certify the continued compliance of this requirement at the end of each financial year.[191]

[186] See Government of India - Ministry of Commerce & Industry, *Consolidated FDI Policy: Circular 2* (D/o IPP F No 5(14)/2010-FC Dated 30092010, 2010).
[187] Japan-India RTA 771-772.
[188] Government of India - Ministry of Commerce & Industry 5.2.11.1.
[189] Ibid 5.2.11.2 and 5.2.11.3.
[190] Ibid 5.2.11.4. Headend-in-the-sky broadcasting services refers to
> 'multichannel downlinking and distribution of television programme in CBand or Ku Band wherein all the pay channels are downlinked at a central facility (Hub/teleport) and again uplinked to a satellite after encryption of channel. At the cable headend these encrypted pay channels are downlinked using a single satellite antenna, transmodulated and sent to the subscribers by using a land based transmission system comprising of infrastructure of cable/optical fibres network.'

[191] Ibid 5.2.11.5.

Annex 6 further contains identical commitments and limitations for concerns audio-visual services to those scheduled under GATS: there are no commitments except for motion picture or video distribution services and the limitations discussed *supra* apply.[192]

Annex 8 contains reservations for measures related to investment that do not comply with the national treatment and MFN obligations or that do impose performance requirements of Chapter 8 of the RTA. Measures contained in present and future FDI Circulars are listed as a horizontal reservation for MFN and national treatment.[193] A horizontal reservation for services functions as a standstill obligation: India reserves the right to maintain any measure relating to investments in services sectors subject to the condition that they do not violate the obligations under Chapter 6.[194] This is an affirmation of Article 90.1 (a) Japan-India RTA. Similarly, and an affirmation of Article 90.1 (b) of the agreement, any existing measures framed by the state governments, union territories and local governments are not subject to either national treatment, MFN or the prohibition of performance requirements obligations derived from Chapter 8.[195]

Annex 9 contains sectors and activities to which the national treatment, MFN and the prohibition of performance requirements obligation do not apply. A horizontal services limitation stresses that India reserves the right to adopt or maintain any measure relating to investments in services sectors subject to the condition that they do not violate the obligations under Chapter 6.[196] India equally reserves the right to adopt or maintain any measure relating to investments as per the laws and regulations framed by the state governments, union territories or local governments.[197]

D.3 Appraisal

The horizontal limitation on national treatment for subsidies in Mode 3 is a recurring limitation to exempt this policy tool from the national treatment obligation. Although no subsidies appear to be in place for the audio-visual services sector, the Indian government preserved its policy space to do so at a later stage.

[192] Japan-India RTA 782.
[193] Ibid 864-870.
[194] Ibid 904.
[195] Ibid 905.
[196] Ibid 969.
[197] Ibid 970.

The broad terminology *"subject to guidelines, terms and conditions as specified from time to time by the Indian government"* which may lead to limitations on both market access and national treatment in Mode 3 allows ample room for manoeuvring for domestic policymakers. The FDI caps again relate to keeping control of specific service suppliers in Indian hands. The 'terms and conditions' may include further specifications in this regard, as for example in the case of Korean nationality requirements for CEOs. The reiteration of GATS commitments and limitations is again directed at ensuring market share for domestic films and ensuring the cinematographic quality of imports.

All other limitations are more broadly applicable than to audio-visual services. The treatment of these services as such is limited. However, the horizontal and general limitations contained in the various annexes could cover many measures that address audio-visual services. In the context of the EU, more commitments have already been made and therefore such general limitations are unlikely to be used extensively in addition to the existing ones in current EU scheduling practice.

CONCLUSIONS AND RECOMMENDATIONS

This report began with a contextualisation of the cultural exception in a complex field of the European services sector. The current embodiment of the cultural exception focuses on audio-visual services, a sector that does not comprise all relevant activities related to the goal of the exception, i.e. the protection of cultural pluralism and diversity. Increasing classification issues also reduce legal certainty on its scope. Moreover, the comprehensive exclusion of audio-visual services may be overly restrictive in order to reach the aforementioned goal, thereby limiting both potential EU offensive interests and the benefits from trade liberalisation in general. The crucial question is whether this form of the cultural exception is sufficiently effective on the one hand and, moreover, not overly restrictive on the other hand.

The four case studies subsequently highlight other possibilities of addressing audio-visual services. The analysis foremost highlights that the U.S. and Japan are willing to leave room for the sensitivities of the audio-visual services sector. RTAs are, in the end, the result of negotiations, and the case studies represent countries with sufficient defensive interests in this sector. In the case of the EU, this would be even more so: any EU commitment on audio-visual

services would be a first in an RTA. Hence, the EU could take advantage of this situation to devise a negotiating strategy that ends up in a balanced situation that adequately and effectively protects cultural diversity and pluralism, and any EU offensive interests in the audio-visual sector. If these offensive interests are deemed insufficient, the increased legal certainty should be welcomed by the audio-visual services sector. As a consequence of scheduling limitations for relevant policy instruments, the possibility of efficient use of these instruments should at the least remain status quo. The gained political capital may subsequently be used in other parts of the negotiations.

The key findings of the comparative analysis are the following. Subsidies have usually been excluded from the scope of the relevant services provisions (or as was the case in the Japan-Switzerland RTA listed as a limitation). This key policy instrument is thereby safeguarded from applicable trade law obligations. This is notable considering that subsidies are in principle subject to GATS obligations (insofar no MFN exemptions have been scheduled, and as concerns market access and national treatment limited by the Schedule of specific commitments).

Furthermore, the U.S. makes use of the negative listing approach. The EU apparently agreed to such an approach in both TiSA and CETA negotiations, at least for national treatment. Switching from positive to negative listing requires comprehensive knowledge of the relevant measures that need to be exempted. In the case of 28 EU Member States, this may not be an easy process. However, as CETA talks draw to a close, there must be some experience in the European Commission of doing so. In any case, if there are to be commitments for audio-visual services, they are likely to be partially made though negative listing.

This change of listing approach is not necessarily problematic for cultural diversity and pluralism. The 2001 Swiss proposal to liberalise audio-visual services whilst protecting cultural pluralism through market access and national treatment obligations may not have satisfied those critical of audio-visual services liberalisation. However, the Japan-Switzerland RTA and, to a lesser extent KORUS, puts this take in practice in a negative listing scenario. The Swiss and Korean limitations show that there can be room for the protection of pluralism. Reservations should nonetheless be phrased very carefully to avoid unwanted liberalisation in the future. Additionally, the focus on measures protecting diversity and pluralism rather than on specific measures leaves room for future policymaking. The recurring Indian limitation on future regulations comes to mind.

Bearing this in mind, there are four ways in which the negotiations can go forward whilst including a cultural exception. First, a rather far-fetched possibility is adding an explicit justification ground to the general exceptions clause for the protection of cultural pluralism. The conditions which would then need to be satisfied are substantial. Even if the policy ground were to be constructed as an easier to satisfy—but unused in GATS—'relating to' (e.g. Article XX (g) GATT: relating to the conservation of exhaustible natural resources) instead of the more stringent 'necessary' (e.g. Article XIV (a) GATS: necessary to protect public morals), the requirements of the chapeau remain difficult to meet. Such an approach would equally be less easy to predict and thus less legally certain.

The second option is a status quo in which audio-visual services are excluded explicitly from the scope of the agreement. Existing RTAs in which this approach was followed, have been concluded with much smaller economies. These trading partners have much less leverage and interests to persuade the EU into making commitments on audio-visual services. In this context, a more likely reference point may be GATS. In the negotiations leading up to the 1995 GATS (and contrary to the Canadian cultural industries exception in the 1994 NAFTA), the EU (and Canada) was unable to exclude audio-visual services from the scope of GATS. In the TTIP and EU-Japan RTA negotiations, a similar situation may occur. While the economic importance of the European market gives the EU strong leverage, it may be questioned whether the U.S. and Japan are likely to accept total exclusion. In the context of TiSA, an exclusion seems even less likely, as this would have implications for the comprehensive nature of the final agreement for all parties.

Third, audio-visual services treatment could copy the GATS approach: they come within the scope but are subject to MFN exemptions and no commitments as concerns market access and national treatment are made. From a defensive point of view, this approach would have the same result as altogether excluding audio-visual services. From an offensive point of view, this could lock-in existing policies from the counterparties. In TiSA, this approach definitely seems most probable.

Under the last option, following the Swiss and Korean approach, carefully drafted limitations which are forward looking could be a strategy to advance European offensive interests whilst maintaining defensive interests and providing legal certainty. This strategy could be complemented by excluding more specific subsectors from the scope of the audio-visual services sector. An example of such practice is the EU GATS schedule on education services,

which excludes publicly funded education from the schedule. In such a case, care should be taken to schedule precisely and comprehensively, especially considering the likelihood of a negative list approach, at least for national treatment.

The case studies show that the U.S. and Japan partners do not necessarily oppose reservations aimed at protecting cultural diversity and pluralism. As was noted in sections 1-3 of this report, exclusion (i.e. options 3 and 4 above) is not necessarily the best option considering that the efficiency of the cultural exception, as applied to audio visual services, vis-à-vis the goal of cultural pluralism may need reconsidering. On the one hand, the EU's size will give European negotiators more leverage than the Canadian, Korean, Swiss and Indian negotiators had. The reservations in the case studies could be considered a baseline standard in that regard. As no European audio-visual commitments have been made to date and given that the sector is known to be a sensitive one, the EU may be able to sell a limited set of commitments for a comparably large prize. On the other hand, the American and Japanese interests in gaining access to the EU market are much larger than in the four cases and more political capital may be invested than before.

In any case, specific European measures and services will be targeted by American and Japanese negotiators. With a very clear rationale for excluding certain services and policy instruments, the EU may find a mutually acceptable compromise more easily achieved. Protecting European cultural identity and pluralism is not only a treaty obligation for the EU but also a crucial defensive interest. Therefore, the strategy to do so should attempt to fulfil this obligation in the most effective way. The current approach is not the most legally certain and raises questions as to its effectiveness. Moreover, it may not cater for all relevant policy concerns. The current negotiations provide a window for readdressing this issue in order to better protect cultural diversity and pluralism whilst capitalising maximally on potential first commitments in the audio-visual services sector.

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ANNEX 1: OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE: 2013 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS

As referred to in footnote 77 of this report, pages 149 and 150 of the U.S. Trade Representative's Report read as follows:

"**Television Broadcasting and Audiovisual Services**

The 2007 EU Directive on Audiovisual Media Services (AVMS) amended and extended the scope of the Television without Frontiers Directive (which already covered traditional broadcasting, whether delivered by terrestrial, cable, or satellite means) to also cover audiovisual media services provided on-demand, including via the Internet. EU Member State content quotas for broadcasting remain in place. On-demand services are subject to somewhat less restrictive provisions than traditional broadcasting under the AVMS Directive, which does not set any strict content quota, but still requires Member States to ensure that on-demand services encourage production of, and access to, EU works. This could be interpreted to refer to the financial contribution made by such services to the production and rights acquisition of EU works or to the prominence of EU works in the catalogues of video on-demand services. EU Member States had to implement the AVMS Directive into their national law by December 19, 2009. In its first report on the application of the Directive from May 2012, the Commission announced that 25 Member States have notified complete implementation into their national legislation. Poland and Belgium, however, still need to adapt their legislation, and the former is currently subject to an infringement procedure for failing to fully implement the Directive.

Member State Measures:

Several EU Member States maintain measures that hinder the free flow of some programming or film exhibitions. A summary of some of the more significant restrictive national practices follows.

France: France continues to apply the EU Broadcast Directive in a restrictive manner. France's implementing legislation, which was approved by the European Commission in 1992, requires that 60 percent of programming be EU and 40 percent French language. These requirements exceed those of the Broadcast Directive. Moreover, these quotas apply to both the regular and prime time programming slots, and the definition of prime time differs from network to network. The prime time restrictions pose a significant barrier to U.S. programs in the French market. Internet, cable, and satellite networks are permitted to broadcast as little as 50 percent EU

content (the AVMS Directive minimum) and 30 percent to 35 percent French-language product, but, in exchange, channels and services are required to increase their investment in the production of French-language product. In addition, radio broadcast quotas that have been in effect since 1996 specify that 40 percent of songs on almost all French private and public radio stations must be in French.

Beyond broadcasting quotas, cinemas must reserve five weeks per quarter for the exhibition of French feature films. This requirement is reduced to four weeks per quarter for theaters that include a French short subject film during six weeks of the preceding quarter. Operators of multiplexes may not screen any one film with more than two prints, or through staggered and interlocking projection techniques, in such a way as to account for more than 30 percent of the multiplex's weekly shows. Theatrically released feature films are not allowed to be advertised on television.

Italy: Broadcasting Law DL 44, which implements EU regulations, reserves 50 percent of the programming time (excluding sports, news, game shows, and advertisements) for EU works. Ten percent of transmissions (and 20 percent for state broadcaster RAI) must be reserved for EU works produced during the preceding five years. Within this quota, an undefined percentage of time must be reserved for Italian movies.

Poland: Broadcasters in Poland must devote at least 33 percent of their broadcasting time each quarter to programming that was originally produced in the Polish language.

Spain: For every three days that a film from a non-EU country is screened, in its original language or dubbed into one of Spain's languages, one EU film must be shown. This ratio is reduced to four to one if the cinema screens a film in an official language of Spain and keeps showing the film in that language throughout the day. In addition, broadcasters and providers of other audiovisual media services must annually invest 5 percent of their revenues in the production of EU and Spanish films and audiovisual programs. In 2010, the government revised the audiovisual law and imposed restrictions on non-EU ownership (limited to no more than 25 percent share) and leasing of AV licenses, which have negatively impacted U.S. investors."

PARTNERS

ENGLISH

The Leuven Centre for Global Governance Studies coordinates a Policy Research Centre on "Foreign Affairs, International Entrepreneurship and Development Cooperation" for the Flemish Government. A Policy Support Centre aims to scientifically support Flemish regional policies. The project brings together 17 senior and 10 junior researchers (including eight PhD students).

The Centre conducts (a) data collection and analysis, and provides (b) short-term policy supporting research, (c) fundamental scientific research and (d) scientific services.

The Policy Research Centre is based on an inter-university consortium led by the Leuven Centre for Global Governance Studies (www.globalgovernancestudies.eu) in cooperation with the Antwerp Centre for Institutions and Multilevel Politics, the Vlerick Leuven Gent Management School and the H.U.Brussel. Within the KU Leuven, colleagues from the Faculty of Business and Economics, the HIVA - Research Institute for Work and Society, the Institute for International and European Policy, the Research Unit International and Foreign Law, the Institute for International Law, and the Institute for European Law are also involved in the project.

NEDERLANDS

Het Leuven Centre for Global Governance Studies (www.globalgovernancestudies.eu) coördineert de derde generatie van het Steunpunt “Buitenlands beleid, internationaal ondernemen en ontwikkelingssamenwerking” voor de Vlaamse Regering. Een Steunpunt heeft als doel de wetenschappelijke ondersteuning van Vlaams beleid.

Het project brengt 17 promotoren en 10 junior onderzoekers (waarvan acht doctoraatsstudenten) samen. Het Steunpunt doet aan (a) dataverzameling en -analyse, (b) korte termijn beleidsondersteunend wetenschappelijk onderzoek, (c) fundamenteel wetenschappelijk onderzoek en (d) wetenschappelijke dienstverlening.

We werken samen met een aantal partners: het Antwerp Centre for Institutions and Multilevel Politics, de Vlerick Leuven Gent Management School en H.U.Brussel. Binnen de KU Leuven maken ook collega’s verbonden aan de Faculteit Economie, het Instituut voor Internationaal en Europees Beleid, de Onderzoekseenheid Internationaal en Buitenlands Recht, het Instituut voor Internationaal Recht, het Instituut voor Europees Recht en HIVA - Onderzoeksinstituut voor Arbeid en Samenleving deel uit van het project.